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2961

No. 15025

United States

Court of Appeals

for the Ninth Circuit

HAROLD WENER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent,

and

MOLLY WENER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —4-26-56

No. 15025

United States

Court of Appeals

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Petitions to Review Decisions of The Tax Court of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Petitioner:

STEPHEN S. GALLAGHER, Esq.
JOHN MOORE ROBINSON, Esq.
MARVIN GOODSON, Esq.
ROBERT M. HIMROD, Esq.
FRANKLIN K. LANE, III, Esq.

For Respondent:

JOHN J. BURKE, Esq.

The Tax Court of the United States

Docket No. 39559

HAROLD WENER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency as set forth by the Commissioner of Internal Revenue in his notice of deficiency (bearing symbols LA:IT:90D:CTF) dated December 21, 1951, and as a basis for his proceedings, alleges as follows:

1. The petitioner is an individual whose address for mailing in this proceeding is 1030 Bank of America Building, 650 South Spring Street, Los Angeles 14, California. Petitioner's return for the year here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to petitioner on December 21, 1951.

3. The taxes in controversy are income taxes for the calendar year ending December 31, 1947 in the total deficiency amount of $5,279.53.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in his determination that the loss in the amount of $15,456.36, suffered by the petitioner in the calendar year 1947, was a loss from the sale of petitioner's partnership interest in Boreva Sportswear Co., a partnership.

(b) The respondent erred in increasing petitioner's share of partnership income from said partnership in the amount of $15,456.36, in the calendar year 1947.

(c) The respondent erred in his determination that the petitioner had a capital loss in the calendar year 1947 in the sum of $15,456.36.

(d) The respondent erred in his determination that petitioner's loss of $15,456.36 in the calendar year 1947, should not be allowed as either.

(1) a loss incurred in a trade or business, or

(2) a loss incurred in a transaction entered into for profit though not connected with the trade or business.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

During 1946 and for some time prior thereto, taxpayer and his wife were partnership members of the partnership doing business as Boreva Sportswear Co. in Illinois and Wisconsin. During 1946 a dispute arose between the taxpayer and his wife on one side, and the other partners on the other side. A dissolution agreement was entered into on September 6, 1946 that dissolved the partnership as of

January 31, 1947. Taxpayer and his wife moved to California in December 1946, where they entered into another sportswear manufacturing business known as Westminster Sportswear Manufacturing Co.

Said dissolution agreement provided the sums to be paid taxpayer and his wife for their partnership interest were to be computed as of the book value of the partnership and the partners' capital account as of January 31, 1947, plus the additional sum of $13,768.50 to be paid taxpayer.

Such dissolution agreement also provided the terms of payment of said moneys after January 31, 1947.

The taxpayer's balance of capital account in Boreva Sportswear as of January 31, 1947, was $49,924.63, and that of his wife was $25,206.49. In accordance with the dissolution agreement and a so-called indemnity agreement collateral thereto, the remaining partners of Boreva Sportswear contracted to pay the taxpayer and his wife said amount less $1,177.56 to indemnify for contingencies. The completed transaction took place on January 31, 1947 as follows:

Sale of partnership interest for.....	$49,142.14
Cost of interest equivalent to capital account January 31, 1947	49,924.63
Capital loss from sale of interest.....	$ 782.49

Taxpayer gave a Bill of Sale on February 1, 1947, covering all partnership assets.

The sale of partnership interests was duly reported as a long-term capital loss for 1947, 50% of which, or $391.25, was taken into account.

Under the contract, the taxpayer received $10,428.28 in April 1947, which left a balance of $38,713.86. This balance was to be paid in installments with interest at 4%, from January 31, 1947, on January 31, 1948, April 15, 1948 and April 15, 1950.

Due to severe economic hardship and business losses, the Westminster Sportswear Co. which taxpayer and his wife had started in California in December 1946 and January 1947, was in such great need of additional financing, that taxpayer and his wife faced complete insolvency which condition reached a critical stage in July and August 1947.

On August 25, 1947, in order to obtain moneys with which to carry on the Westminster Sportswear Manufacturing Co., taxpayer and his wife settled the total outstanding balance due them of $58,268.13 for the total sum of $35,000.00 cash. Taxpayer's share was $23,257.50 and his wife's share $11,742.50. At that time, taxpayer and his wife executed a mutual release with the debtors. The release resulted in a loss to the taxpayer:

Balance to be received on contract.....	$38,713.86
Cash accepted for immediate payment...	23,257.50
Loss from transaction	$15,456.36

This transaction was entirely separate and apart from the sale of the partnership interest which had been agreed to in September 1946 and was moti-

vated on the part of the taxpayer and his wife by the urgent need of funds at that time.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income tax due from the petitioner for the year 1947; and for such other and further relief as the Court may deem meet and proper in the premises.

Respectfully submitted,

/s/ STEPHEN S. GALLAGHER,
/s/ JOHN MOORE ROBINSON,
/s/ MARVIN GOODSON,
Counsel for Petitioner

Duly Verified.

EXHIBIT A

Treasury Department, Internal Revenue Service,
417 South Hill Street, Los Angeles 13, Calif.

Office of Internal Agent in Charge, Los Angeles Division—LA:IT:90D:CTF.

Mr. Harold Wener
1201 South Van Ness Avenue
Santa Ana, California

Dec. 21, 1951

Dear Mr. Wener:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947 discloses a deficiency of $5,279.53, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:CONF. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner,

/s/ By GEORGE D. MARTIN,
Internal Revenue Agent in Charge

CTF:vmc—Enclosures: Statement, Form of Waiver
GPO 16-32058-5

Statement
Tax Liability for the Taxable Year Ended
December 31, 1947

	Deficiency
Income tax	$5,279.53

In making this determination of your income tax liability careful consideration has been given to the report of examination dated December 20, 1950, to your protest dated February 23, 1951, and to the statements made at the conferences held.

A copy of this letter and statement has been mailed to your representative, Mr. Gilbert G. Platt, 719 North Main Street, Santa Ana, California, in accordance with the authorization contained in the power of attorney executed by you.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$ 6,197.87
Additional income:		
(a) Partnership income increased		15,456.36
Total		$ 21,654.23
Additional deductions:		
(b) Capital loss from sale of partnership interest allowed	$1,349.63	
(c) Contributions increased	344.51	1,694.14
Net income adjusted		$ 19,960.09

EXPLANATION OF ADJUSTMENTS

(a) In your income tax return for the year 1947 you reported loss in the amount of $15,456.36 resulting from the sale of your interest in the partnership, Boreva Sportswear Co., as an ordinary loss deductible in full from your share of the distributable net

income of that partnership for its fiscal year ended January 31, 1947. It is determined that this loss from the sale of your partnership interest constituted a capital loss.

Therefore, your partnership income is increased in the amount of $15,456.36, and appropriate adjustment is made in item (b) for allowance of the loss as a capital loss.

(b) You are allowed a capital loss of $15,456.36, as explained in adjustment (a) above, 50 per cent of which, or $7,728.18, is taken into consideration as a long-term capital loss. The adjustment to your income is computed as follows:

Net gain from sale or exchange of capital assets as reported in your return	$ 349.63
Long-term capital loss from sale of partnership interest allowed	7,728.18
Net capital loss determined	$ 7,378.55
Net capital loss deductible in your 1947 return limited under section 117(d)(2) I.R.C.	$ 1,000.00*
Net capital gain reported	349.63
Adjustment	$ 1,349.63

* The balance represents a capital loss carry-over under section 117(e), I.R.C.

(c) You are allowed a deduction for contributions in the amount of $1,789.44 in lieu of $1,444.93 claimed in your return, an increase of $344.51.

COMPUTATION OF TAX

Net income adjusted		$ 19,960.09
Less: Exemptions		1,000.00
Balance, subject to surtax and normal tax		$ 18,960.09
Tentative surtax	$6,140.05	
Tentative normal tax at 3%	568.80	
Total tentative tax	$6,708.85	
Less 5%	335.44	
Correct income tax liability		$ 6,373.41

Income tax liability shown on return, account No. 3056579	1,093.88
Deficiency of income tax	$ 5,279.53

[Endorsed]: T.C.U.S. Filed March 19, 1952.

[Title of Tax Court and Cause No. 39559.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a) to (d) inclusive. Denies the allegations of error contained in subparagraphs (a) to (d) inclusive of paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition, and all unnumbered subparagraphs thereof.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ MASON B. LEMING REM
Acting Chief Counsel, Bureau of Internal Revenue

Of Counsel:

B. H. Neblett, District Counsel.
R. E. Maiden, Jr., Clayton J. Burrell, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed April 30, 1952.

The Tax Court of the United States

Docket No. 39560

MRS. MOLLY WENER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency as set forth by the Commissioner of Internal Revenue in his notice of deficiency (bearing symbols LA:IT:90D:CTF) dated December 21, 1951, and as a basis for her proceedings, alleges as follows:

1. The petitioner is an individual whose address for mailing in this proceeding is 1030 Bank of America Building, 650 South Spring Street, Los Angeles 14, California. Petitioner's return for the year here involved was filed with the Collector of

Internal Revenue for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to petitioner on December 21, 1951.

3. The taxes in controversy are income taxes for the calendar year ending December 31, 1947 in the total deficiency amount of $283.07.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in his determination that the loss in the amount of $7,803.77 suffered by the petitioner in the calendar year 1947, was a loss from the sale of petitioner's partnership interest in Boreva Sportswear Co., a partnership.

(b) The respondent erred in increasing petitioner's share of partnership income from said partnership in the amount of $7,803.77, in the calendar year 1947.

(c) The respondent erred in his determination that the petitioner had a capital loss in the calendar year 1947 in the sum of $7,803.77.

(d) The respondent erred in his determination that petitioner's loss of $7,803.77 in the calendar year 1947, should not be allowed as either

(1) a loss incurred in a trade or business, or

(2) a loss incurred in a transaction entered into for profit though not connected with the trade or business.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

During 1946 and for some time prior thereto, taxpayer and her husband were partnership members of the partnership doing business as Boreva Sportswear Co. in Illinois and Wisconsin. During 1946 a dispute arose between the taxpayer and her husband on one side, and the other partners on the other side. A dissolution agreement was entered into on September 6, 1946 that dissolved the partnership as of January 31, 1947. Taxpayer and her husband moved to California in December 1946, where they entered into another sportswear manufacturing business known as Westminster Sportswear Manufacturing Co.

Said dissolution agreement provided the sums to be paid taxpayer and her husband for their partnership interest were to be computed as of the book value of the partnership and the partners' capital account as of January 31, 1947, plus the additional sum of $13,768.50 to be paid taxpayer's husband.

Such dissolution agreement also provided the terms of payment of said moneys after January 31, 1947.

The taxpayer's balance of capital account in Boreva Sportswear as of January 31, 1947, was $25,206.49, and that of her husband was $49,924.63. In accordance with the dissolution agreement and a so-called indemnity agreement collateral thereto, the remaining partners of Boreva Sportswear con-

tracted to pay the taxpayer and her husband said amount less $1,177.56 to indemnify for contingencies. The completed transaction took place on January 31, 1947, as follows:

Sale of partnership interest for.....	$24,811.42
Cost of interest equivalent to capital account January 31, 1947	25,206.49
Capital loss from sale of interest.....	$ 395.07

Taxpayer gave a Bill of Sale on February 1, 1947, covering all partnership assets.

The sale of partnership interests was duly reported as a long-term capital loss for 1947, 50% of which, or $197.53, was taken into account.

Under the contract, the taxpayer received $5,265.15 in April 1947, which left a balance of $19,546.27. This balance was to be paid in installments with interest at 4%, from January 31, 1947, on January 31, 1948, April 15, 1948 and April 15, 1950.

Due to severe economic hardship and business losses, the Westminster Sportswear Co. which taxpayer and her husband had started in California in December 1946 and January 1947, was in such great need of additional financing, that taxpayer and her husband faced complete insolvency which condition reached a critical stage in July and August 1947.

On August 25, 1947, in order to obtain moneys with which to carry on the Westminster Sportswear Manufacturing Co., taxpayer and her husband set-

tled the total outstanding balance due them of $58,-268.13 for the total sum of $35,000.00 cash. Taxpayer's share was $11,742.50 and her husband's share $23,257.50. At that time, taxpayer and her husband executed a mutual release with the debtors. The release resulted in a loss to the taxpayer:

Balance to be received on contract.....	$19,546.27
Cash accepted for immediate payment...	11,742.50
Loss from transaction	$ 7,803.77

This transaction was entirely separate and apart from the sale of the partnership interest which had been agreed to in September 1946 and was motivated on the part of the taxpayer and her husband by the urgent need of funds at that time.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income tax due from the petitioner for the year 1947; and for such other and further relief as the Court may deem meet and proper in the premises.

Respectfully submitted,

/s/ STEPHEN S. GALLAGHER,

/s/ JOHN MOORE ROBINSON,

/s/ MARVIN GOODSON,

Counsel for Petitioner

Duly Verified.

EXHIBIT A

Treasury Department, Internal Revenue Service,
417 South Hill Street, Los Angeles 13, Calif.

Office of Internal Revenue Agent in Charge, Los Angeles Division—LA:IT:90D:CTF.

Mrs. Molly Wener
1201 South Van Ness Avenue
Santa Ana, California

Dec. 21, 1951

Dear Mrs. Wener:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947 discloses a deficiency of $238.59, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:CONF. The signing and filing of this form will expedite the closing of your return by permitting an early as-

sessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner

/s/ By GEORGE D. MARTIN,
Internal Revenue Agent in Charge

CTF:vmc—Enclosures: Statement, Form of waiver.
GPO 16-23058-5

Statement

Tax Liability for the Taxable Year Ended December 31, 1947

	Deficiency
Income tax	$ 238.59

In making this determination of your income tax liability careful consideration has been given to the report of examination dated December 20, 1950, to your protest dated February 23, 1951, and to the statements made at the conference held.

A copy of this letter and statement has been mailed to your representative, Mr. Gilbert G. Platt, 719 North Main Street, Santa Ana, California, in accordance with the authorization contained in the power of attorney executed by you.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return (loss)		$(3,870.35)
Additional income and unallowable deductions:		
(a) Partnership income increased		7,803.77
(b) Medical expense deduction decreased		213.86
Total		$4,147.28
Additional deductions:		
(c) Capital loss from sale of partnership interest allowed	$1,689.20	
(d) Contributions allowed	702.34	2,391.54
Net income adjusted		$1,755.74

EXPLANATION OF ADJUSTMENTS

(a) In your income tax return for the year 1947 you reported loss in the amount of $7,803.77 resulting from the sale of your interest in the partnership, Boreva Sportswear Co., as an ordinary loss deductible in full from your share of the distributable net income of that partnership for its fiscal year ended January 31, 1947. It is determined that this loss from the sale of your partnership interest constituted a capital loss.

Therefore, your partnership income is increased in the amount of $7,803.77, and appropriate adjustment is made in item (c) for allowance of the loss as a capital loss.

(b) You claimed a deduction for medical expenses in the amount of $447.97 which is allowable to the extent of $234.11 (5% of $4,682.28, your adjusted gross income determined). The balance of $213.86 represents an unallowable deduction. Section 23(x), I.R.C.

(c) You are allowed a capital loss of $7,803.77, as explained in adjustment (a) above, 50 per cent of which, or $3,901.89, is taken into consideration as a long-term capital loss. The adjustment to your income is computed as follows:

Net gain from the sale or exchange of capital assets as reported in your return	$	689.20
Long-term capital loss from sale of partnership interest allowed		3,901.89
Net capital loss determined	$	3,212.69
Net capital loss deductible in your 1947 return limited under section 117(d)(2), I.R.C.	$	1,000.00*
Net capital gain reported		689.20
Adjustment	$	1,689.20

* The balance represents a capital loss carry-over under section 117(e), I.R.C.

(d) In your return you show total contributions of $2,026.95 but claimed none as a deduction since your return reflected no adjusted gross income. Since it has been determined that you had adjusted gross income of $4,682.28, you are allowed a deduction for contributions of $702.34 (15 per cent of $4,682.28). Section 23(o), I.R.C.

COMPUTATION OF TAX

Net income adjusted		$1,755.74
Less: Exemption		500.00
Balance, subject to surtax and normal tax		$1,255.74
Tentative surtax	$ 213.48	
Tentative normal tax at 3%	37.67	
Total tentative tax	$ 251.15	
Less 5%	12.56	
Correct income tax liability	$	238.59
Income tax liability shown on return, account No. 85708145		None
Deficiency of income tax	$	238.59

[Endorsed]: T.C.U.S. Filed March 19, 1952.

[Title of Tax Court and Cause No. 39560.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a) to (d) inclusive. Denies the allegations of error contained in subparagraphs (a) to (d) inclusive, of paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition, and all unnumbered subparagraphs thereof.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ MASON B. LEMING REM
Acting Chief Counsel, Bureau of Internal Revenue

Of Counsel:

B. H. Neblett, District Counsel.
R. E. Maiden, Jr., Clayton J. Burrell, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed April 30, 1952.

EXHIBIT No. 3

[Attached to Stipulation of Facts]

DISSOLUTION AGREEMENT OF LIMITED PARTNERSHIP OF BOREVA SPORTSWEAR CO.

This Agreement, dated as of July 31, 1946 but actually made and entered into this 6th day of September, 1946, by and between Leon A. Smoler, Allan A. Joseph, Harold Wener, Dorothy Jane Smoler, Margaret M. Joseph and Molly Wener,

Witnesseth: That

Whereas, the parties hereto did heretofore enter into that certain Limited Partnership Agreement of Boreva Sportswear Co., dated September 7, 1943 wherein the said Leon A. Smoler, Allan A. Joseph and Harold Wener are general partners and the said Dorothy Jane Smoler, Margaret M. Joseph and Molly Wener are limited partners, which said agreement has been modified by supplemental agreements entered into between said parties dated February 1, 1944, February 1, 1945 and December 10, 1945 respectively and which agreement as modified by said supplements is now in full force and effect; and

Whereas, the general partner, Harold Wener, has delivered to the remaining general partners, Leon A. Smoler and Allan A. Joseph a written notice of intention to retire from said partnership pursuant to the provisions of paragraph 16 of the partnership agreement as modified in the supplement dated December 10, 1945, which said notice states the said

Harold Wener's intention to retire on January 31, 1947, receipt whereof is hereby acknowledged; and

Whereas, the parties hereto desire to provide presently for the orderly withdrawal of the said Harold Wener's interest in the business, together with the interest of the limited partner, Molly Wener:

Now, Therefore, in consideration of the premises, the parties hereto do hereby mutually covenant and agree:

1. That the general partner, Harold Wener, and the limited partner, Molly Wener, shall retire and withdraw from the partnership agreement and the business as of January 31, 1947.

2. That the surviving partners, Leon A. Smoler, Allan A. Joseph, Dorothy Jane Smoler and Margaret M. Joseph, shall continue the business and shall exercise and do hereby exercise the option provided for in paragraph 16 of the supplement of December 10, 1945 to acquire the interests of Harold Wener and Molly Wener on the terms and conditions hereinafter stated in lieu of the terms stated in said paragraph and other paragraphs of the partnership agreement and its supplements.

3. The total sum to be paid to Harold Wener for his interest in the partnership shall be equal to the book value thereof as of the severance date, January 31, 1947, to be ascertained by an accounting taken as of the close of business, computed according to the Company's customary accounting

procedure, it being agreed in such event that the value of the goodwill or of the firm name shall not be included as an asset for such purpose, plus the sum of $13,768.50.

4. The total sum to be paid to Molly Wener for her interest in the partnership shall be equal to the book value thereof as of January 31, 1947, to be ascertained by the same accounting provided for in the preceding paragraph hereof.

5. The purchase price for the interest of Harold Wener and Molly Wener, to be determined as aforesaid, shall be payable as follows: Fifty per cent (50%) of the purchase price as so determined minus fifty per cent (50%) of the amount of all withdrawals made by them after August 31, 1946, on or before thirty days from and after January 31, 1947; forty (40%) per cent of the balance of the purchase price on or before January 31, 1948; thirty percent (30%) of such balance on or before April 15, 1948; and the remaining thirty per cent (30%) of such balance on or before April 15, 1950; together with interest on the balance of such purchase price remaining from time to time unpaid (other than the initial payment due on or before thirty (30) days from and after January 31, 1947) at the rate of four per cent (4%) per annum from January 31, 1947 until paid, such interest to be payable concurrently with said deferred payments. Said amounts shall be payable to Harold Wener and Molly Wener respectively, in the proportions that the respective purchase price of each of their said shares bears to the total purchase price. In the

event that any of said payments are not made on their due dates as aforesaid, all subsequent payments, thirty (30) days after written notice to one or both of the surviving general partners shall become due and payable at the option of the retiring partners, Harold Wener and Molly Wener.

6. For all purposes hereof, it is agreed that there shall be an accounting taken as of the close of business on January 31, 1947 to be computed according to the Company's customary accounting procedure as determined by Sidney Bernstein, Certified Public Accountant. For the purpose of such accounting, it is agreed that the value of the goodwill or of the firm name shall not be included as an asset and it is agreed that in case of any dispute as to valuations of properties or assets of the firm or as to accounting procedures to be used in determining the value of the interests of said Harold Wener and Molly Wener, the said Sidney Bernstein is hereby designated the sole arbitrator to decide such questions and his decision shall be binding upon all parties hereto.

7. General partner Harold Wener covenants and agrees that he will not, either solely, or jointly with, or as agent for any person or persons, association or associations, or corporation or corporations, directly or indirectly, carry on the business of manufacturing women's sportswear and/or any other goods, chattels and merchandise competing with articles then manufactured by the partnership for the period of five (5) years from and after the severance date, at any place or places within a

radius of fifty (50) miles from any manufacturing plant in which the partnership may be carrying on its business or any part thereof, or in which goods, chattels and merchandise may be manufactured for the partnership under any contractual relationship or otherwise.

8. The partnership agrees prior to the time of dissolution to pay to the firm of Glick and Kayner, legal fees in the sum of $5,000.00 for services rendered in this matter.

9. The covenants and agreements herein contained shall be binding upon and shall inure to the benefit of the respective parties, their heirs, testamentary beneficiaries, personal representatives and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written, in six counterparts.

.....(Seal)
.....(Seal)
.....(Seal)
.....(Seal)
.....(Seal)
.....(Seal)

State of Illinois,
County of Cook—ss.

I, Rose S. Fenning, a Notary Public in and for said County in the State aforesaid do hereby certify that Allan A. Joseph and Margaret N. Joseph, his wife, personally known to me to be the same persons whose names are subscribed on the foregoing in-

strument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 1st day of May, A.D., 1947.

[Seal] /s/ ROSE S. FENNING,
Notary Public

EXHIBIT No. 5

[Attached to Stipulation of Facts]

BILL OF SALE

This Indenture, made this 1st day of February, 1947 by and between Leon A. Smoler, Allan A. Joseph, Harry Wener, Dorothy Jane Smoler, Margaret N. Joseph and Molly Wener, as copartners doing business under the name and style of Boreva Sportswear Co., a limited partnership (hereinafter referred to as Transferors), and Leon A. Smoler, Allan A. Joseph, Dorothy Jane Smoler and Margaret N. Joseph, individually (hereinafter referred to as Transferees),

Witnesseth: That

Whereas, the said Transferors have heretofore been conducting business as copartners under the name and style of Boreva Sportswear Co. under a limited partnership agreement dated September

7, 1943 as modified by supplemental agreements entered into between said parties and dated February 1, 1944, February 1, 1945 and December 10, 1945 respectively, and have heretofore agreed to dissolve said limited partnership and distribute its assets as of the close of business January 31, 1947 pursuant to the provisions of a dissolution agreement dated as of July 31, 1946, but actually made and entered into between the parties hereto on September 6, 1946; and

Whereas, said copartners have been conducting the business of manufacturing, buying, selling and trading in women's sportswear and other merchandise; and

Whereas, by this Indenture the Transferors intend to assign, transfer, convey and vest in the said Transferees individually the property, assets and rights of the Transferors in said limited partnership;

Now, Therefore, in consideration of the premises and other valuable considerations to them delivered by the Transferees, receipt whereof is hereby acknowledged, and in further consideration of the covenants and undertakings of the Transferees hereinafter expressed, the Transferors have assigned, transferred, set over, conveyed to and vested in, and by these presents do assign, transfer, set over, convey to and vest in the Transferees, subject to the debts, liabilities, contracts, commitments, engagements and obligations of the Transferors as copartners of the firm conducting business under the name and style of Boreva Sportswear Co., a limited partnership, as shown on the books of said limited

partnership as of the close of business on January 31, 1947, all the property, assets and rights of the Transferors and all of their right, title and interest therein, in and to said partnership including, but not by way of limitation, the following:

Cash on hand; the entire stock and inventory of all kinds on hand, including but not limited to raw materials, work in process, and completed items; all machinery, tools, equipment, fixtures, furniture, supplies and sundries; all insurance of every kind and character; all right, title and interest in and to any trademarks, trade names, brands, labels, patents and patent rights; all accounts receivable, choses in action, assets and effects of every kind and description, including orders on hand, the business and goodwill and exclusive right to the fullest extent presently possessed by the Transferors to the use of the name "Boreva Sportswear Co."; each of said Transferees to have a joint interest in all of said property, assets and rights in accordance with their respective interests therein as determined by all of the applicable provisions of their partnership agreement dated September 7, 1943 as modified by supplemental agreements dated February 1, 1944, February 1, 1945 and December 10, 1945 respectively, and dissolution agreement dated as of July 31, 1946 aforesaid;

To Have And To Hold the property, assets and rights hereby assigned, transferred, set over and conveyed to and vested in the Transferees, their heirs, executors, administrators and assigns.

Nothing herein contained shall constitute a con-

veyance or transfer of any of the assets of the Transferors other than those assets constituting the respective interests of the Transferors in and to said partnership, and the property, assets and rights assigned, transferred and conveyed by the Transferors contemporaneously herewith and referred to collectively as "the properties presently conveyed."

Section 1. The Transferors, for themselves, their heirs, executors, administrators and assigns, hereby covenant and agree that:

(a) Forthwith upon the acquisition thereof the Transferors will assign, transfer and convey, or cause to be assigned, transferred and conveyed to the Transferees, by good and sufficient instruments, any property or assets acquired subsequent to the date of this Indenture in their capacity as copartners in the firm of Boreva Sportswear Co.;

(b) At any time and from time to time forthwith upon the written request of the Transferees, the Transferors will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all and every such further acts, deeds, assignments, transfers, conveyances, powers of attorney and assurances as may be required for the better assigning, transferring, setting over, conveying, assuring and confirming unto and vesting in the Transferees, their successors and assigns, or for aiding and assisting in collecting or reducing to possession any or all of the properties presently conveyed and any and all of the property, assets, and rights transferred or conveyed by

virtue of any instrument or act executed or done respectively in pursuance of this Indenture;

(c) If the action of any other party is required to effect the assignment and transfer to the Transferees of any of the properties presently conveyed, the Transferors will use their best efforts to cause such action to be taken.

Section 2. The Transferors hereby constitute and appoint the Transferees, their successors and assigns, the true and lawful attorney and attorneys of the Transferors, with full power of substitution, in the name and stead of the Transferors, but on behalf and for the benefit of the Transferees, their successors and assigns, to demand and receive any and all of the above mentioned property, assets and rights, and to give receipts and releases for and in respect of the same, and any part thereof, and from time to time to institute and prosecute in the name of the Transferors, or otherwise, at the expense and for the benefit of the Transferees, their successors and assigns, any and all proceedings at law, in equity or otherwise, which the Transferees, their successors or assigns, may deem proper in order to collect or reduce to possession any of the above mentioned property, assets and rights or to enforce any claim or right of any kind in respect thereof, and to do all acts and things in relation to the above mentioned property, assets, claims and rights which the Transferees, their successors or assigns shall deem desirable, the Transferors hereby declaring that the foregoing powers are coupled with an interest and are not revocable and shall not be revoked by the Trans-

ferors, or in any other manner or for any reason whatsoever.

Section 3. The Transferors authorize the Transferees, their successors and assigns, to receive and open all mail, telegrams and other communications, and all express and other packages, addressed to the Transferors, and to retain the same in so far as they relate to any of the properties presently conveyed. The foregoing shall constitute full authorization to the postal authorities, all telegraph and express companies and all other persons to make delivery of such items to the Transferees, their successors and assigns.

Section 4. The Transferees, for themselves, their successors and assigns, agree to assume and hereby do assume all the debts, liabilities, contracts, commitments, engagements and obligations, absolute or contingent, of the Transferors as copartners of the firm doing business under the name and style of Boreva Sportswear Co., incurred by said copartners in the ordinary course of business, existing at the date hereof or which may hereafter come into existence, and shown on the books of the Transferors as such copartners as of the close of business on January 31, 1947, and agree to exonerate, indemnify and hold harmless the Transferors, their heirs, administrators, successors and assigns, from and against all suits, proceedings, claims, demands and judgments (and all loss, cost, damage or expense incident thereto) in respect of any such debts, liabilities, contracts, commitments, engagements and obligations so incurred. Nothing herein contained

shall be deemed to obligate the Transferees to assume any obligation of the Transferors incurred by any of the Transferors in connection with that certain indemnity agreement dated as of July 31, 1946, but actually made and entered into September 6, 1946, by and between the parties hereto or otherwise incurred in their individual capacities.

Section 5. This Indenture shall be binding upon and shall inure to the benefit of the respective heirs, administrators, successors and assigns of the parties hereto.

In Witness Whereof, the parties hereto have each of them hereunto set their hands and seals, all as of the day and year first above written.

[Seal] /s/ LEON A. SMOLER
[Seal] /s/ ALLAN A. JOSEPH
[Seal] /s/ HARRY WENER
[Seal] /s/ DOROTHY JANE SMOLER
[Seal] /s/ MARGARET M. JOSEPH
[Seal] /s/ MOLLY WENER

Transferors

[Seal] /s/ LEON A. SMOLER
[Seal] /s/ ALLAN A. JOSEPH
[Seal] /s/ DOROTHY JANE SMOLER
[Seal] /s/ MARGARET JOSEPH

Transferees

State of California,
County of Orange—ss.

I, Samuel Hurwitz, a Notary Public in and for said County in the State aforesaid do hereby certify

that Harold Wener and Molly Wener, his wife, personally known to me to be the same persons whose names are subscribed on the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 26 day of March A. D., 1947.

[Seal] /s/ SAMUEL HURWITZ,
Notary Public

State of Illinois,
County of Cook—ss.

I, Rose S. Fenning, a Notary Public in and for said County in the State aforesaid do hereby certify that Leon A. Smoler and Dorothy J. Smoler, his wife, personally known to me to be the same persons whose names are subscribed on the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 1st day of May A.D., 1947.

[Seal] /s/ ROSE S. FENNING,
Notary Public

State of Illinois,
County of Cook—ss.

I, Rose S. Fenning, a Notary Public in and for said County in the State aforesaid do hereby certify that Allan A. Joseph and Margaret N. Joseph, his wife, personally known to me to be the same persons whose names are subscribed on the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 1st day of May A.D., 1947.

[Seal] /s/ ROSE S. FENNING,
Notary Public

EXHIBIT No. 6

[Attached to Stipulation of Facts]

MUTUAL RELEASE

This Mutual Release made and entered into this 25th day of August, 1947, by and between Harold Wener and Molly Wener, hereinafter referred to as first parties, and Leon A. Smoler, Dorothy J. Smoler, Allan A. Joseph and Margaret M. Joseph, hereinafter referred to as second parties,

Witnesseth:

Whereas, the parties hereto did heretofore enter into certain agreements in writing dated September

6, 1946, one being a dissolution agreement of the limited partnership of Boreva Sportswear Company, wherein and whereby said limited partnership was terminated as of January 31, 1947, Harold Wener and Molly Wener retired and withdrew from said partnership agreement, and the business as of January 31, 1947, and the price to be paid for their respective interests was fixed and determined, and the other being an indemnity agreement wherein and whereby the said first parties agreed to and did thereby indemnify the second parties against certain contingent liabilities therein more particularly described; and

Whereas, under the provisions of said dissolution agreement the amounts to be paid to parties of the first part were provided to be paid in installments, of which three (3) installments remain and are due respectively with interest as therein provided on or before January 31, 1948, on or before April 15, 1948 and on or before April 15, 1950, aggregating the sum of Fifty-Eight Thousand Two Hundred Sixty Dollars and Thirteen Cents ($58,260.13); and parties of the first part have requested parties of the second part and do hereby request them to anticipate said future due payments to the extent of Thirty-Five Thousand Dollars ($35,000.00) and have offered to and do hereby agree to forgive and cancel the balance of said obligation of parties of the second part in consideration of an exchange of mutual releases;

Now, Therefore, in consideration of the sum of

Thirty-Five Thousand Dollars ($35,000.00) in hand paid by parties of the second part to or for the use and benefit of parties of the first part, receipt whereof is hereby acknowledged, it is mutually covenanted and agreed:

1. Parties of the first part have remised, released and discharged and by these presents do for themselves, their heirs, executors, administrators and assigns, remise, release and forever discharge said parties of the second part, their heirs, executors and administrators of and from all claims, demands, obligations, liabilities and causes of action contained in or arising out of or in any way connected with said dissolution agreement of limited partnership of Boreva Sportswear Company and said indemnity agreement, both dated September 6, 1946, and of and from all manner of actions, cause and causes of action, suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, agreements, promises, damages, claims and demands whatsoever in law or in equity which parties of the first part now have against parties of the second part or ever had or which their heirs, executors or administrators hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of time to the day of the date of these presents.

2. Parties of the second part have remised, released and discharged and by these presents do for themselves, their heirs, executors, administrators and assigns, remove, release and forever discharge

said parties of the first part, their heirs, executors and administrators of and from all claims, demands, obligations, liabilities and causes of action contained in or arising out of or in any way connected with said dissolution agreement of limited partnership of Boreva Sportswear Company and said indemnity agreement, both dated September 6, 1946, and of and from all manner of actions, cause and causes of action, suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, agreements, promises, damages, claims and demands whatsoever in law or in equity which parties of the second part now have against parties of the first part or ever had or which their heirs, executors or administrators hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of time to the day of the date of these presents.

In Witness Whereof, the parties hereto have hereunto affixed their hands and seals as of the day, month and year first above written.

[Seal] /s/ HAROLD WENER
[Seal] /s/ MOLLY WENER
First Parties

[Seal] /s/ LEON A. SMOLER
[Seal] /s/ DOROTHY J. SMOLER
[Seal] /s/ ALLAN A. JOSEPH
[Seal] /s/ MARGARET JOSEPH
Second Parties

State of California,
County of Los Angeles—ss.

I, the undersigned, a Notary Public in and for said County and State aforesaid, do hereby certify that Harold Wener and Molly Wener, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 29th day of August, A. D. 1947.

[Seal] /s/ C. C. FULLER,
Notary Public

State of Illinois,
County of Cook—ss.

I, the undersigned, a Notary Public in and for said County and State aforesaid, do hereby certify that Leon A. Smoler and Dorothy J. Smoler, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 26th day of August, A. D. 1947.

[Seal] /s/ THERESA GRAY,
Notary Public

State of Illinois,
County of Cook—ss.

I, the undersigned, a Notary Public in and for said County and State aforesaid, do hereby certify that Allan A. Joseph and Margaret M. Joseph, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 26th day of August, A. D. 1947.

[Seal] /s/ THERESA GRAY,
Notary Public

[Title of Tax Court and Causes No. 39559-60.]

Filed June 29, 1955

FINDINGS OF FACT AND OPINION

The petitioners, as of February 1, 1947, executed a Bill of Sale of their respective interests in a partnership, with an initial payment to be made within thirty days and the remainder to be paid in three installments, two in 1948 and one in 1950. Later in 1947, and before any of the installments had become due, they entered into negotiations with the purchasers which resulted in a complete and final closing of the transaction for a present cash payment which was less than the aggregate of the in-

stallments which would have become due and payable in the later years. Held, that the losses sustained by petitioners were capital losses within the meaning of the statute, and subject to the limitations therein provided.

Franklin K. Lane III, Esq., and Robert M. Himrod, Esq., for the petitioners.

John J. Burke, Esq., for the respondent.

The respondent determined deficiencies in income tax against the petitioners Harold Wener and Molly Wener of $5,279.53 and $238.59 for the taxable year 1947. The only question for determination is whether certain losses sustained by them in the taxable year were or were not capital losses within the meaning of the statute.

Findings of Fact

Some of the facts have been stipulated and are so found.

The petitioners are husband and wife, and filed individual income tax returns for the year 1947 with the collector of internal revenue for the sixth district of California.

Prior to and during 1946 the petitioners were members of a partnership doing business as the Boreva Sportswear Company in Chicago, Illinois, and Stoughton, Wisconsin, sometimes referred to hereafter as Boreva. The partners other than petitioners were Leon A. Smoler and his wife, Dorothy J. Smoler, and Allan A. Joseph and his wife, Margaret Joseph. Harold Wener, Leon A. Smoler and

Allan A. Joseph were general partners and their wives were limited partners.

In 1946, differences arose between the petitioners, on the one hand, and the four other partners, on the other. As a result of these differences, the partners, on September 6, 1946, executed an agreement, entitled Dissolution Agreement of Limited Partnership, whereunder it was agreed that the petitioners should retire and withdraw from the partnership as of January 31, 1947, and that the other partners should purchase the interests of the petitioners. The sums to be paid for the interests were to be book value as of the severance date, and were to be computed "according to the Company's customary accounting procedure, it being agreed in such event that the value of the goodwill or of the firm name shall not be included as an asset for such purpose, plus the sum of $13,768.50." In arriving at book value, an actual inventory was to be taken at the lower of cost or market and any real estate that might be owned by the partnership was to be conformed to "the value as of the severance date."

It was provided in the above agreement that the payments for the interests of petitioners were to be made in installments. Fifty per cent of the purchase price, less fifty per cent of the withdrawals of the petitioners after August 31, 1946, was to be paid on or before thirty days from January 31, 1947; forty per cent of the balance on or before January 31, 1948; thirty per cent of such balance on or before April 15, 1948; and the remainder on or before

April 15, 1950. Interest was to run at four per cent, except as to the initial payment.

Under date of February 1, 1947, the petitioners, by a writing entitled Bill of Sale, and in consideration of the covenants and undertakings of the other four partners, assigned and conveyed to the latter their interests in Boreva as of the close of business on the preceding day.

An audit was made as theretofore specified, whereby the respective partners' interests were determined as of January 31, 1947, and as of that date, the balance in the capital account of Harold Wener was found to be $49,924.63, and that of Molly Wener $25,206.49. Against these balances, charges were made under an indemnity agreement theretofore made, whereby the petitioners were obligated to indemnify the other four partners against certain contingent liabilities. The aggregate of the charges was in the amount of $1,177.58.[1] The initial payments computed under the Dissolution Agreement and made to the petitioners pursuant thereto in April of 1947, were $10,428.28 to Harold Wener and $5,265.13 to Molly Wener, leaving the balances due them to be paid in installments on January 31, 1948, April 15, 1948, and April 15, 1950.

Subsequent to their agreement to withdraw from

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[1] The aggregate of the indemnity charges is shown in the stipulation as $1,177.56, but a reconciliation of other figures which were likewise stipulated indicates that the amount actually charged was $1,177.58, of which $782.49 was charged against the capital account of Harold Wener, and $395.09 against that of Molly Wener.

Boreva, the petitioners moved to California, where they established a sportswear manufacturing company in Westminster, California.

On or before August 25, 1947, and before any further payments were due from the sale of their interests in Boreva, petitioners entered into negotiations with the purchasers with respect to the balances which were thereafter to become due and payable. On August 25, 1947, and in consideration of immediate payment, as against later payment on the installment dates theretofore specified and agreed upon, the petitioners agreed to accept, and did accept, $35,000 in complete satisfaction of the aggregate amounts which would have become payable to them on the installment dates, and the $35,000 so agreed upon was currently paid to and received by them.

Harold Wener's share of the $35,000 was $23,257.50, as compared with $38,713.86, which represented the aggregate of the payments which would have become due and payable to him by installments. Molly Wener's share of the $35,000 was $11,742.50, as compared with $19,546.27, which would have become due and payable to her by installments.

A factor which prompted the petitioners in initiating the negotiations which resulted in the adjustment of the terms of the original sales agreement, as shown above, was that the petitioners had a present pressing need of funds for use in the business they had established in California.

The over-all result of the sale by petitioners of

their interests in Boreva, including the adjustments of both payment dates and amounts, all of which occurred in the taxable year 1947, was a loss of $15,456.36 by Harold Wener and a loss of $7,803.77 by Molly Wener. In their returns for 1947, the petitioners treated the said losses as ordinary losses, deductible in full.

The respondent in his determination of the deficiencies determined that the losses were capital losses under the statute, and subject to the limitations provided therein.

Opinion

Turner, Judge: It is the contention of the petitioners that they sold their interests in Boreva at February 1, 1947, at the basis therefor to them, and that the losses were sustained under the agreement of August 25, 1947, in a transaction separate and apart from the sale, and that the latter transaction was not a sale of a capital asset and the resulting loss not a capital loss, but an ordinary loss deductible in full. They cite and rely upon Hale vs. Helvering, 85 F.2d 819, as being controlling.

It is the position of the respondent that the various agreements, including the agreement of August 25, 1947, and the steps taken thereunder, were part and parcel of one transaction, namely, the sale by the petitioners of their partnership interests, and that the losses sustained were capital losses, as determined.

It is our opinion and we hold that the losses were sustained from the sale by petitioners of their capital interests in the partnership and that the re-

spondent did not err in his determination with respect thereto. The mere fact that there would have been no losses if the terms of the sale as originally agreed upon had remained unchanged and the payments pursuant thereto had been made does not on the facts indicate or require the conclusion that the losses were sustained in a transaction separate and apart from the sale. After the initial payments, but later in the same year and before any of the installments had become due and payable, the petitioners, for reasons which were solely their own, saw fit to renegotiate the unexecuted portions of the sales agreement, namely, the deferred payment provisions, to the end that for a present cash payment in lieu of later payments in installments, as theretofore provided, the petitioners agreed upon and accepted reduced prices for their interests in Boreva. These renegotiated provisions superceded the provisions which had originally prescribed the terms, dates and amounts of payment, and the transaction was closed pursuant thereto. See Borin Corporation, 39 B.T.A. 712, affd. 117 F.2d 917; Pinkney Packing Co., 42 B.T.A. 823; and Des Moines Improvement Co., 7 B.T.A. 279. See also Hirsch vs. Commissioner, 115 F.2d 656, reversing 41 B.T.A. 890, which reversal was followed in A. L. Killian Co., 44 B.T.A. 169, which in turn was affirmed at 128 F.2d 433.

Hale vs. Helvering, on which the petitioners most strongly rely, is not this case. There the transaction was the compromise settlement of a past due obligation, and the question was whether there had

been a sale of the obligation. In the instant case, and prior to the dates the remainder of the purchase price was to become due, there was a renegotiation, adjustment, or revamping of the sale itself both as to price and the terms of payment. We accordingly do not reach the question considered and decided in the Hale case. L. D. Coddon & Bros. Inc., 37 B.T.A. 393, also cited and relied on by the petitioners, is likewise distinguishable. The distinction made in that case of Des Moines Improvement Co., supra, applies with equal force to the instant case. Furthermore, as already pointed out, there was in fact in the instant case a renegotiation and revision of the unexecuted provisions of the sales contract itself and the substitution of new provisions therefor.

In passing, attention is called to the decision of the Supreme Court in Arrowsmith vs. Commissioner, 344 U.S. 6. In that case, the original transaction had been regarded as finally closed some four years prior to the taxable year. But, due to judgments subsequently obtained by third parties, payments were required of the taxpayers, resulting in losses to them. It was the opinion of the Supreme Court that character of the losses which so resulted as capital losses or ordinary losses was to be determined by reference to the original transaction. The original transaction having been a capital gain or loss transaction, the losses actually incurred in years after the transaction was regarded as closed were held to be capital losses.

Decisions will be entered under Rule 50.

Served June 29, 1955.

The Tax Court of the United States
Washington

Docket No. 39559

HAROLD WENER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court filed June 29, 1955, the parties on August 30, 1955, having filed an agreed computation of the tax involved, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1947 in the amount of $5,279.53.

[Seal] /s/ BOLON B. TURNER,
Judge

Entered September 2, 1955.

The Tax Court of the United States
Washington

Docket No. 39560

MOLLY WENER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court filed June 29, 1955, the parties on August 30, 1955, having filed an agreed computation of the tax involved, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1947 in the amount of $238.59.

/s/ BOLON B. TURNER,
Judge

Entered: September 2, 1955.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Cause No. 39559.]

PETITION FOR REVIEW

Comes now Harold Wener, through his attorneys, Robinson and Powers by Franklin K. Lane III, and petitions the United States Court of Appeals

for the Ninth Circuit to review the decision of the Tax Court of the United States, rendered in the above cause on September 2, 1955 (Docket No. 39559), and deciding that there is a deficiency in the income tax of your petitioner in the amount of $5,279.53 for the calendar year 1947.

Petitioner filed his individual income tax return for the calendar year 1947 with the Collector of Internal Revenue for the Sixth District at Los Angeles, California, which District is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The controversy involves the proper determination of the petitioner's liability for federal income taxes for the calendar year 1947. The petitioner sold his interest in a partnership in February, 1947, for a certain sum which was to be paid in installments over a period of years by the remaining partners. About seven months later, in the same calendar year, your petitioner discounted the balance remaining on the purchase price and accepted a lesser sum in cash in full settlement of the balance owed by the purchasers of the partnership interest. The petitioner reported as an ordinary loss for the calendar year 1947 the difference between the cash amount accepted by him in full settlement and the balance due on the purchase price under the installment obligation.

The Commissioner of Internal Revenue held that the loss sustained by the petitioner on the discount of the balance remaining on the purchase price was a capital loss arising out of the sale of the partner-

ship interest, which position was sustained by the Tax Court of the United States in its decision referred to above.

The petitioner, being aggrieved by the findings of fact and conclusions of law contained in the findings and opinion of the Tax Court in this cause and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ FRANKLIN K. LANE III.
Of Robinson and Powers, Counsel
for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed December 2, 1955.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Court Cause No. 39560.]

PETITION FOR REVIEW

Comes now Molly Wener, through her attorneys, Robinson and Powers by Franklin K. Lane III, and petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision of the Tax Court of the United States, rendered in the above cause on September 2, 1955 (Docket No. 39560) ordering and deciding that there is a deficiency in the income tax of your petitioner in the amount of $238.59 for the calendar year 1947.

Petitioner filed her individual income tax return for the calendar year 1947 with the Collector of Internal Revenue for the Sixth District at Los Angeles, California, which District is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The controversy involves the proper determination of the petitioner's liability for federal income taxes for the calendar year 1947. The petitioner sold her interest in a partnership in February, 1947, for a certain sum which was to be paid in installments over a period of years by the remaining partners. About seven months later, in the same calendar year, your petitioner discounted the balance remaining on the purchase price and accepted a lesser sum in cash in full settlement of the balance owed by the purchasers of the partnership interest. The petitioner reported as an ordinary loss for the calendar year 1947 the difference between the cash amount paid in settlement and the balance due on the purchase price under the installment obligation.

The Commissioner of Internal Revenue held that the loss sustained by the petitioner as a result of the discount of the balance remaining on the purchase price was a capital loss arising out of the sale of the partnership interest, which position was sustained by the Tax Court of the United States in its decision referred to above.

The petitioner, being aggrieved by the findings of fact and conclusions of law contained in the findings and opinion of the Tax Court in this cause

and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ FRANKLIN K. LANE III.
Of Robinson and Powers, Counsel for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed December 2, 1955.

In the United States Court of Appeals for the Ninth Circuit

[Title of Tax Court Cause Nos. 39559-60.]

STATEMENT OF ORAL TESTIMONY OF HAROLD WENER

Contained on pages 13 through 28 of the official transcript of the hearing in the above matter held at Los Angeles, California, on February 27, 1953.

Mr. Wener testified that in 1946 he was engaged in the business of manufacturing and selling ladies sportswear clothes under a partnership which was composed of he and his wife and two other married couples. The six partners had been in the same business for several years prior to that time.

They had a manufacturing plant in Wisconsin and a sales office in Chicago. Mr. Wener was the designer and production manager.

In 1946 a disagreement arose between Mr. Wener and his other partners, particularly his copartner,

Leon Smoler, as a result of which he decided to withdraw from the partnership.

On September 6, 1946 he entered into a Dissolution Agreement with the other four partners under the terms of which the four remaining partners were to purchase the partnership interests of Mr. Wener and his wife at the book value as of January 31, 1947.

He ceased any active participation in the partnership in September of 1946. Then, on January 31, 1947, the partnership was dissolved and Mr. Wener and his wife executed a Bill of Sale transferring their partnership interests to the remaining partners in consideration for the payment of a sum of approximately $75,131.12, to be paid in installments over a period of about three years with the first payment due in January, 1947.

The first installment made was actually made in April, 1947 amounting to approximately $15,000.00.

Mr. Wener then came to Westminster, California, where he constructed a sportswear manufacturing plant with money invested by both himself and his wife.

During their first year of operation they had a loss and were in need of additional working capital and cash. He borrowed $20,000.00 from the Bank of America giving as collateral the indebtedness due him by the remaining partners in Chicago, as represented by a written contract.

Mr. Wener identified a letter dated August 14, 1947 from H. N. Warren, Assistant Manager of the Bank of America, which was introduced as Peti-

tioners' Exhibit No. 8. This letter was written at the request of Mr. Wener.

Having attempted to raise additional cash in many ways, Mr. Wener then contacted his former partners in an attempt to persuade them to make a lump sum payment in full settlement of the balance on the purchase price due to Mr. Wener. The first settlement offer from Mr. Wener was rejected by the former partners, who in turn made a counter-offer of settlement of $35,000.00, which was almost $24,000.00 less than what they were obligated to pay Mr. Wener.

Mr. Wener agreed to accept their offer of $35,-000.00 in full settlement of the balance of the purchase price, which sum was paid to Mr. Wener about August 29, 1947. From this $35,000.00 he paid $10,000.00 to the Bank of America, which represented the balance due on the loan of $20,000.00.

Mr. Wener identified certified copies of the bank statements of the Westminster Sportswear Co. for the month of August 1947, which were introduced in evidence as Exhibit No. 9. Mr. Wener identified a deposit entry on the bank statement dated August 29, 1947 in the amount of $25,444.06 as representing the balance of the $35,000.00 he received from his former partners. He further testified that this amount was used in his business.

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed January 23, 1956.

[Endorsed]: Filed Mar. 1, 1956. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Court Causes Nos. 39559-60.]

STATEMENT OF POINTS ON APPEAL

Now comes Harold Wener and Molly Wener, the appellants in the above entitled actions, through their attorney, Franklin K. Lane III, and hereby assert the following errors which it intends to urge on review by the United States Court of Appeals for the Ninth Circuit, of the decisions of the Tax Court of the United States rendered in the above entitled actions on December 2, 1955:

1. The Tax Court erred in finding that the losses sustained by the appellants were from the sale of their partnership interests and therefore resulted in capital losses rather than ordinary losses arising from the cancellation of indebtedness, or losses incurred in business.

2. The Tax Court erred in failing to find that the acceptance of an immediate lesser sum by the appellants in cash in lieu of installment payments over a period of years resulted in an ordinary loss to the appellants.

3. The Tax Court erred in finding that the settlement or a compromise agreement entered into in August 1947 between appellants and their former partners was a renegotiation or revision of the original contract under which they sold their partnership interests.

4. The Tax Court erred in failing to find that

the settlement or compromise agreement of August 1947 between appellants and their former partners was in fact a discount of an obligation to pay money, which transaction was separate and apart from the sale by the appellants their partnership interests.

5. The Tax Court erred in entering its decision, wherein it ordered and decided that there is a deficiency in income tax against the appellant Harold Wener in the amount of $5,279.53 and against the appellant, Molly Wener, in the amount of $238.59 for the calendar year 1947.

/s/ FRANKLIN K. LANE III.
Attorney for Appellants

[Endorsed]: T.C.U.S. Filed January 23, 1956.

The Tax Court of the United States
Washington

[Title of Causes Nos. 39559-60.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 18, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review", "Designation of Additional Portions of Record" and "Supplemental Designation of Additional Portions of Record," including Exhibits 1 through 6 attached to the Stipulation of Facts and Petitioners' Exhibits 7, 8

and 9 admitted in evidence, in the proceedings before The Tax Court of the United States entitled: "Harold Wener, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 39559" and "Molly Wener, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 39560" and in which the Petitioners in the Tax Court proceedings have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 25th day of January, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, The Tax Court of the
United States

[Endorsed]: No. 15025. United States Court of Appeals for the Ninth Circuit. Harold Wener, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and Molly Wener, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed: February 3, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15025

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD WINTER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MORTON WEINER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitions to Review Decisions of the Tax Court of the United States.

BRIEF FOR THE PETITIONERS.

FRANKLIN E. LANE, III, of
ROTHROCK & POWERS
650 South Spring Street,
Los Angeles 14, California,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 15025

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD WENER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOLLY WENER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitions to Review Decisions of the Tax Court of the United States.

BRIEF FOR THE PETITIONERS.

Jurisdiction.

This case is before the above entitled Court upon appeals from decisions of the Tax Court of the United States entered in docket numbers 39559 and 39560 on September 2, 1955. Petitions for review [R. 49-53] of both said decisions were duly filed and jurisdiction of this court was invoked under the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954 (26 U. S. C. A. 7482, *et seq.*).

The decision of the Tax Court of the United States, from which these appeals are taken, is reported in 24 T. C. 529.

Statement of the Case.

The Respondent assessed deficiencies in the income tax for the calendar year 1947 against both Petitioners arising out of the disallowance as an ordinary loss of losses sustained by the Petitioners upon the compromise of indebtedness arising from the sale of their partnership interests in a sportswear manufacturing business to their co-partners.

On February 1, 1947, the Petitioners sold their respective partnership interests in the business to the four remaining partners, and executed a Bill of Sale therefor to the purchasers. Partial payment of the purchase price was made shortly thereafter. The balance was to be paid in fixed installments over a period of several years.

The Petitioners then moved to California, and about seven months later encountered serious financial difficulties in a similar business in that state. To prevent their complete insolvency, the Petitioners opened negotiations with the purchasers in order that they might receive a lump sum cash payment in anticipation of the installments due in the future. These negotiations resulted in the acceptance by the Petitioners in August, 1947, of a lump sum payment in cash in full settlement of the balance due to them from the purchasers. This sum was $23,268.13 less than the balance of the purchase price which the

purchasers would have been required to pay in installments over the next few years.

In their income tax returns for the calendar year 1947 the Petitioners treated their respective shares of the cancelled indebtedness of $23,268.13 as an ordinary loss. This loss was subsequently disallowed by the Respondent and income tax deficiencies were assessed against the Petitioners resulting from said disallowance.

The Tax Court found that the losses sustained by the Petitioners were capital losses resulting from a reduction of the sale price of their partnership interests.

It is the position of the Petitioners that the settlement or compromise agreement under which they accepted a lesser sum in cash for the balance of the purchase price owed them from the sale of their partnership interests was, in fact, a discount of an obligation to pay money or a cancellation of indebtedness, or a loss incurred in business, fully deductible as an ordinary loss under Section 23(e) of the Internal Revenue Code of 1939.

Question Presented.

The sole question for determination by this Court is whether the loss sustained by the Petitioners as a result of the compromise of the amounts due them from the sale of their partnership interests is an ordinary or a capital loss.

ARGUMENT.

I.

The Tax Court Erred as a Matter of Law in Finding That the Loss Sustained by the Petitioners From the Compromise or Settlement of the Balance of the Purchase Price Owed Them Was a Capital Loss.

The fundamental question for determination by this Court is the character of the loss sustained by the Petitioners upon the compromise of the indebtedness owed them by the purchasers of their partnership interests.

There is no question as to the facts of these cases. The Petitioners and Respondent entered into a Stipulation of Facts involving all the material elements of this case prior to trial. The findings of the Tax Court [R. 41-45] were based upon said Stipulation and accurately set forth the facts involved.

In order to determine the nature of the transaction which gave rise to the loss sustained by the Petitioners, it is advisable to examine the events that led up to the compromise of August, 1947.

The Petitioners and their co-partners entered into a Dissolution Agreement [Ex. 3, R. 22] on September 6, 1946, which set forth the terms and conditions under which the Petitioners would withdraw from the partnership and provided for the purchase of their partnership interests by the remaining partners. It should be noted that the purchase price was the book value of such interests as of the agreed date of dissolution, namely Janu-

ary 31, 1947. A reading of paragraph 2 of the Dissolution Agreement [R. 23] reveals that the remaining partners had an option to purchase the partnership interests of the Petitioners. The actual sale to the remaining partners did not take place until February 1, 1947, almost five months after the Dissolution Agreement was executed. There can be no doubt but that the purchase price was reasonable and that the parties to the sale dealt at arm's length and in good faith.

Pursuant to the Dissolution Agreement, the Petitioners withdrew from the partnership on January 31, 1947. On the following day, February 1, 1947, they executed a written Bill of Sale [Ex. 5, R. 27], transferring to the purchasers all of their title and interest in the partnership.

The effect of the execution of the Bill of Sale was to fully and completely divest the Petitioners of all of their property rights and interests in the partnership assets owned by them. The Petitioners retained no interest whatsoever in the partnership or any of its assets. The purchasers assumed all of the partnership liabilities and obligations. The only connection between the Petitioners and the purchasers was the relationship of creditor and debtor. As of February 1, 1947, the purchasers became indebted, under the Dissolution Agreement of September 6, 1946, to the Petitioners in the sum of $73,953.56, which was to be paid in installments over a period of years. This obligation was not represented by a note or other evidence of indebtedness. It was merely an unsecured

contractual obligation to pay a certain sum of money in installments over a period of time.

It is the contention of the Petitioners that the sale of their partnership interests on February 1, 1947, was a completed and closed transaction for income tax purposes. It is well settled law that the gain or loss upon the sale of a capital asset, such as a partnership interest, is recognized only upon the completion or close of such sale. Losses must, in general, be evidenced by closed and completed transactions, fixed by identifiable events, to be deductible from gross income. 1939 Treas. Regs., Secs. 39.23(e)-1(b) and 29.23(e)-1; *C. F. Mueller Co.,* 40 B. T. A. 195; *Barnes v. Commissioner,* 45 B. T. A. 267 (1941). A closed transaction occurs when there is a sale or other transfer of title to property. It is manifest therefore, that the sale of the Petitioners' partnership interests was completed and closed as of February 1, 1947. Title had passed and there were no contingencies or events to happen at some future date to complete this transaction. Accordingly, Petitioners, in their 1947 income tax returns, reported a slight loss which they realized from these sales.

Some seven months later the Petitioners, as creditors, accepted the sum of $35,000.00 in cash in satisfaction of the unpaid balance of $58,268.13 due them from the purchasers at that time. There can be no argument but that the only relationship existing at that time between the Petitioners and their former partners was that of creditor and debtor. The effect of the acceptance of a lesser sum by the Petitioners and the resulting cancellation of the balance of the purchase price was, in every

sense, a cancellation of indebtedness resulting in an ordinary loss to the Petitioners.

It is well settled law that the cancellation of indebtedness or compromise of a monetary obligation results in an ordinary loss to the forgiving creditor. *Earle v. Commissioner,* 9 T. C. M. 1181 (1950); *Jenckes Co., Inc.,* 4 B. T. A. 765.

While it is true that a loss on the sale or exchange of a capital asset is a capital loss, nevertheless, if the transaction is in fact a settlement of a monetary obligation resulting in the cancellation of indebtedness instead of a sale or exchange, the result is an ordinary loss. Thus where a mortgagee accepted less than the full amount due on a mortgage before maturity, he was entitled to an ordinary loss. *I. T. 4018, 1950—2* C. B. 20. That ruling of the Treasury Department involved a taxpayer who sold a capital asset, namely his farm, for $15,000.00, receiving $5,000.00 in cash and a $10,000.00 purchase money mortgage payable over a period of years. The next year, when the taxpayer was in need of additional funds, he accepted $9,000.00 in cash from the purchaser in full satisfaction of the unpaid balance of the purchase price, resulting in a $1,000.00 loss to him. It should be pointed out that at the time of the compromise, the purchaser was fully able to pay the entire amount of the indebtedness and there had been no decrease in the value of the mortgaged property. The Treasury Department ruled that the transaction was not a sale or exchange under Section 117(a) of the 1939 Internal Revenue Code, and that the loss was fully deductible as an ordinary loss. The Treasury Department reasoned that the property of the taxpayer in the mortgage was extinguished by allow-

ance of a discount and payment of the balance of the mortgage indebtedness. The only difference between that ruling and the case under consideration is that in the former the indebtedness was secured by real property mortgage, whereas in the case at hand there is no security involved at all.

The Tax Court has held that where a creditor in need of cash accepts less than the face amount in compromise and settlement of a debt not yet due from a solvent debtor, the result is an ordinary loss. *Charles S. Guggenheimer,* 8 T. C. 789. The courts have reasoned that the settlement completely extinguishes the debt, leaving no balance which may be regarded as an unpaid debt. *West Coast Securities Co. v. Commissioner,* 14 T. C. 947 (1950).

The Tax Court has also ruled that an ordinary loss deduction may result from a compromise arising out of a mutual release such as is found in the case under consideration. *Russell Wheel Foundry Co.,* 3 B. T. A. 1168. That case differs from the facts under consideration in that the debtor had asserted certain counter claims against the creditors. The Commissioner, in assessing a deficiency arising from disallowance of the ordinary losses taken by the taxpayer, contended that the mutual releases constituted a sale or exchange, depriving the taxpayer of an ordinary loss. However, the Tax Court held that there was no sale or exchange and allowed an ordinary loss to the petitioners.

In reason and logic, if the cancellation or compromise of indebtedness by a creditor results in an ordinary loss to him, such forgiveness should result in gain or taxable income to the debtor. Certainly the Respondent shall not be permitted to take inconsistent positions in a factual

situation such as this. Therefore, it is certainly reasonable to examine the many cases decided by the courts which have held that the forgiveness or cancellation of indebtedness results in income to the debtor, in order to establish that the same transaction results in an ordinary loss to the creditor.

An example of such cases is that of *L. D. Coddon and Bros. v. Commissioner,* 37 B. T. A. 393 (1938). There the taxpayer-debtor satisfied an indebtedness of $19,250.00, secured by a mortgage on real property, for the sum of $12,000.00. The taxpayer contended that, as the Respondent does in the case at hand, the transaction by which the original debt was satisfied at less than its face value was merely an adjustment of the purchase price, resulting in a capital loss. The Board of Tax Appeals rejected that reasoning and held that where a solvent debtor is under a direct obligation to make payments for property purchased by him and satisfies that obligation by paying less than the amount called for by the obligation, the transaction will result in taxable income to the debtor in the amount by which the face value of the obligation exceeds the amount paid by him for its satisfaction. Therefore, conversely, the loss sustained by the seller as a result of the settlement of the obligation should be treated as an ordinary loss to off-set the gain or income taxed to the debtor.

To the same effect that the cancellation of indebtedness is income to the debtor are the following cases: *Bowers v. Kerbaugh Empire,* 271 U. S. 170 (1925); *United States v. Kirby Co.,* 284 U. S. 1 (1931); *Consolidated Gas Co.,* 24 B. T. A. 901 (1931); *B. F. Avery and Sons, Inc.,* 26 B. T. A. 1393 (1932).

II.

The Loss Sustained by a Creditor Upon the Compromise or Cancellation of Indebtedness Is Not a Capital Loss as It Does Not Arise From a Sale or Exchange Under the 1939 Internal Revenue Code.

The Respondent has taken the untenable position that the lost sustained by the Petitioners is a capital loss subject to capital loss limitations under the provisions of Section 117(a) of the 1939 Internal Revenue Code which was in effect at the time of the transaction involved here.

It is manifest that if the Respondent is to sustain this position, he has the burden of establishing that the transaction entered into in August, 1947, by the Petitioners and their former partners comes within the definition of a capital loss as contained in the 1939 Internal Revenue Code.

Section 117(a)(5) of that Code defines a long-term capital loss in the following terms:

> "The term 'long-term capital loss' means loss from the *sale or exchange* of a capital asset held for more than six months, if and to the extent that such loss is taken into account in computing net income." (Emphasis added.)

Petitioners concede that the debt in their hands was a capital asset but contend that its compromise is not a sale or exchange under the tax laws.

The courts have consistently held that the compromise, correction or settlement of indebtedness does not involve a "sale or exchange" which can give rise to a capital

gain or loss. This rule has been set forth in Mertens, The Law of Federal Taxation (1953), Vol. 5, pp. 417, 418:

> "If there has been no sale or exchange, there can be no capital loss except in the case of securities, which become worthless, bonds which are returned and losses from short sales. A cancellation of a debt in return for a partial payment is not a sale or exchange."

A creditor who collects on his claim neither sells nor exchanges his property interest in the debt. The claim is extinguished, fully or in part, but it is not transferred in any sense of the word. *Lee v. Commissioner,* 119 F. 2d 946; *Bingham v. Commissioner,* 105 F. 2d 971. Such extinguishment of a claim by payment or settlement is the contrary of a sale or exchange. The same is true of a partial satisfaction, whether the creditor gives the debtor, by way of compromise, discharge in full or remains entitled to the unpaid balance.

In the case of *Hale v. Helvering,* 85 F. 2d 819 (1936), the court stated:

> ". . . the compromise with the maker, who is able to pay then, of promissory notes, for less than their face value, does not constitute a sale or exchange of capital assets . . . there was no acquisition of property by the debtor, nor transfer of property to him. Neither businessmen nor lawyers call the compromise of a note a sale to the maker. In point of law and in legal parlance property in the notes as capital assets was extinguished, not sold. In business parlance the transaction was a settlement and the notes were turned over to the maker, not sold to him. In *John H. Watson, Jr. v.*

> *Commissioner of Internal Revenue,* 27 B. T. A. 463 . . . it was held that the payment at maturity, of the face amount of bonds purchased at a premium, was not a sale or exchange resulting in a capital loss. If the full satisfaction of an obligation does not constitute a sale or exchange, neither does partial satisfaction. . . ."

The reasoning of the *Hale* case, *supra,* is applicable to the facts in the case under consideration. The transaction of August, 1947, was nothing more than the compromise of indebtedness owed to the Petitioners by their former partners. The Petitioners agreed to accept a part of the amount owing to them in complete satisfaction and extinguishment of the balance of the purchase price. A document entitled "Mutual Release" [Ex. 6, R. 35] was executed by both parties setting forth the amounts which were then due to the Petitioners and providing that they agreed to accept a specified lesser sum in full settlement of the balance due. It further provided that the Petitioners ". . . agree to forgive and cancel the balance of said obligation of (the purchasers) in consideration of an exchange of mutual releases." A reading of paragraphs 1 and 2 of the Mutual Release [R. 37] indicates that the agreement was in fact a complete mutual release and discharge of all claims and obligations between the parties. The Tax Court has recently ruled that a mutual release or surrender of claims such as found in the case at hand does not constitute a sale or exchange. *Stewart E. Earle v. Commissioner,* 9 T. C. M. 1181 (1950).

The rule that an amount received in payment or compromise of an obligation by the creditor is not received on a sale or exchange thereof has been consistently ad-

hered to by the courts. *Commonwealth, Inc. v. Commissioner,* 36 B. T. A. 850 (1937); *Fairbanks v. United States,* 306 U. S. 436; *United States v. Burrows Bros. Co.,* 133 F. 2d 772.

It is submitted, in view of the foregoing discussion and the authorities cited in support thereof, that the compromise agreement of August, 1947, was not a sale or exchange within the meaning of Section 117(a)(5) of the 1939 Internal Revenue Code. It follows, therefore, that the loss sustained by the Petitioners was not a capital loss.

III.

The Losses Sustained by the Appellants Were Fully Deductible Under Section 23 of the 1939 Internal Revenue Code.

Section 23(e) of the 1939 Internal Revenue Code provides for the deduction from gross income of the following items:

> "(e) Losses by Individuals—In the case of an individual, losses sustained during the taxable year . . .
>
> (1) if incurred in trade or business; or
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; . . ."

It is submitted that the loss sustained by the Petitioners is such a loss incurred in trade or business, and should be deductible in full. The evidence shows that the Petitioners were in serious financial difficulty with their new business in California in the summer of 1947. Mr. Wener testified [R. 53, 54] that both of the Petitioners invested what money they had, including the first payment received

from the purchasers, in their new business in California. The record shows that the business was operated at a loss and that the Petitioners were compelled to borrow from the Bank of America the sum of $20,000.00, assigning to the Bank their interest under the sale contract as collateral security [R. 54]. Petitioners had exhausted all means for raising money for their business, and, as a last resort, they turned to the remaining balance due them under the sale contract. Part of the $35,000.00 cash received under the terms of the settlement was used to pay off the business loan from the Bank of America and the balance was deposited in the business [R. 55].

The evidence in this case clearly shows that the Petitioners took a loss in order to raise money for their business needs. Any loss sustained from entering into a transaction for business purposes is deductible under Section 23(e)(1), Internal Revenue Code (1939). This should be true where the transaction is a compromise of indebtedness entered into for the specific purpose of raising business funds.

In the case of *West Coast Securities Company v. Commissioner,* 14 T. C. 947 (1950), the petitioner-corporation was allowed a deduction for a business loss under Internal Revenue Code, Section 23 in the amount of the discount given in the settlement of a debt, though the debtor was solvent and there was little question but what it would be fully paid when due. In holding that the taxpayer was entitled to an ordinary loss deduction as a result of the compromise settlement of certain notes it held with the maker, the Court stated:

> "The obligations which were compromised by the petitioner had not matured at the time of settlement,

> and the compromise did not stem from any determination of probable worthlessness, but arose as a necessary incident of petitioner's liquidation."

In that case it was necessary for the taxpayer to raise cash quickly in order to meet its debts and to make liquid funds with which to make distribution to its stockholders. The Court reasoned further:

> "There is no disagreement between the parties that petitioner sustained an out-of-pocket loss in the amount of $43,577.50, as the result of . . . (the settlement) . . . The income tax is levied on a taxpayer's net income, and, to determine such net income, all genuine losses actually sustained by the taxpayer during the taxable year in connection with regular business transactions or transactions entered into for profit are generally allowable. * * * We know of no cases, no provisions of the statutes, or no reason why the loss suffered may not be deducted in determining petitioner's taxable net income * * *."

By analogy, it is submitted that if the compromise of notes with the maker by a corporation, necessitated by a desire for immediate cash funds, as in the *West Coast Securities* case, *supra,* gives rise to a business loss, then the same should be true with respect to an individual taxpayer. In discounting the obligations of their former partners to raise immediate cash for their business, the Petitioners sustained a business loss in every sense of the word.

Even if the Court should decide that the compromise of August, 1947, was a sale or exchange of a capital asset by the Petitioners, the evidence is clear that such a transaction was entered into not for the purpose

of realizing a gain or a loss on such a capital transaction, but rather in order to accomplish a necessary business purpose. There are many cases in which the courts have held that because of the business purpose behind the transaction, the taxpayer should be allowed to deduct a claimed loss on the sale of exchange of a capital asset in full as a business loss even though the loss otherwise meets the specifications of a capital loss. *Helvering v. Community Bond and Mortgage Corp.,* 74 F. 2d 727; *Pressed Steel Car Co., Inc.,* 20 T. C. 198 (1930); *Bagley and Sewall Co.,* 20 T. C. 983 (1930).

The Tax Court has even held that where an attorney withdrew from a law firm, forfeiting his partnership interest, that the resulting loss was incurred in trade or business and fully deductible. *Hutchenson v. Commissioner,* 17 T. C. 14 (1951); *Gannon v. Commissioner,* 16 T. C. 1134 (1951); *Scherman v. Helvering,* 74 F. 2d 742. These cases involve the forfeiture of a capital asset for business reasons which is allowed as an ordinary loss. This is substantially in effect what the Petitioners were required to do with the portion of the indebtedness cancelled by them in order to save their business in California. They were compelled to forfeit that portion of the purchase price which the Respondent contends is a capital loss solely to obtain working capital for the business [R. 44 and 54, 55]. For that reason they should be allowed to deduct their loss in full under the reasoning of the above authorities.

IV.

The Cases Relied Upon by the Tax Court in Support of Its Decision Are Distinguishable.

The decision of the Tax Court in the cases under consideration [R. 45] is apparently based upon the theory that because the settlement between the Petitioner and their former partners was consummated in the same year as the sale and prior to the payment of any of the installments on the purchase price, that the transaction was in effect no more than a renegotiation or adjustment of the original sales contract of February 1st of that year. Such reasoning is contrary not only to logic, but also to previous Tax Court decisions holding that where a creditor releases a solvent debtor, prior to maturity, from part of the debtor's obligation because it was to the financial interest of the creditor to do so that the resultant loss was fully deductible by the creditor. *Charles S. Guggenheimer,* 8 T. C. 789. In reason and logic, it should make no difference whether the settlement was entered into before or after the obligation to pay had matured. In either case, the indebtedness is fixed both as to amount and time of payment. The obligation to pay is absolute. The economic effect of accepting a lesser sum for the balance of the purchase price is identically the same in either case. Therefore, the tax effect of such a compromise of indebtedness should be the same in both instances. There is no basis in law or fact for according different treatment to a release of liability depending upon when the indebtedness is forgiven.

The Tax Court also relied upon the case of *Borin Corporation,* 39 B. T. A. 712, affd. 117 F. 2d 917. That case is clearly not in point for the reason that it

involved the execution of a second sale contract between the seller and purchaser which expressly rescinded and cancelled the original contract. The purchase price under the second contract was substantially reduced in settlement of the purchasers claims for breach of contract and warranty under the original sales contract. There was no true cancellation of indebtedness. The terms and conditions of the second contract differed materially from those contained in the original. The court properly concluded that the first sales contract had been mutually cancelled and that the second contract became the only agreement between the buyer and seller. The facts in that case are entirely different from the case at hand. Here we have only one contract, and no claims for its breach by the purchasers which would entitle them to compensation or damages. Further, we have no rescission of the original contract and substitution of another in its place differing substantially in terms and conditions.

The case of *Pinkney Packing Co.,* 42 B. T. A. 823 (1940), cited by the Tax Court in support of its decision, involved the question of the treatment of the release by the seller of a part of the purchase price which the buyer was obligated to pay in installments over 10 years in consideration for a lump cash payment. However, it should be noted that it was agreed between buyer and seller at the time the sale was executed that the buyer would have the option to purchase the property by a lump sum payment at any time during the installment period. That case did not involve a true forgiveness or cancellation of indebtedness, but rather the interpretation of the option given to the buyer at the time the sale was consummated to purchase the property for a lump

sum, as an alternative to an installment purchase. The case is further distinguishable as the seller retained a lien on the property as security.

Conclusion.

Under Points I and II Petitioners have established that the compromise of a monetary indebtedness, whether it be based on inability to collect or by reason of anticipating the payment of the indebtedness, is not a sale or exchange within the meaning of Section 117(a)(5) of the Internal Revenue Code of 1939. Therefore, the compromise agreement entered into in August, 1947, by them could not result in a capital loss.

The compromise agreement of August, 1947, was clearly a separate and independent transaction, having no relation, either legally or in logic, to the sale of the partnership interests on February 1, 1947. The latter transaction was a completed and closed event, not only in common business understanding and usage, but also under the tax laws. The Petitioners retained no interest, directly or indirectly, in their partnership assets and they reported the resulting capital loss from the closed transaction on their 1947 income tax returns.

The settlement transaction was the result of arms-length negotiations entered into in good faith months after the completed sale of February 1st of that year. It was, in fact, a true and genuine cancellation of indebtedness resulting in complete extinguishment of all obligations, and should be treated as an ordinary loss, deductible in full by Petitioners. The additional reasons set out in Point III support the conclusion that the loss sustained should be allowed as one incurred in trade or business under the provisions of Section 23 of the 1939 Internal

Revenue Code. As has been incontrovertibly shown the loss was sustained by the Petitioners solely and simply for business reasons, and therefore should be allowed as a business loss.

For the reasons stated above and the arguments set forth in this brief, it is respectfully submitted that the decisions of the Tax Court should be reversed and judgment entered in favor of the Petitioners.

Respectfully submitted,

FRANKLIN K. LANE, III, of
ROBINSON & POWERS,
Attorneys for Petitioners.

June 1, 1956.

No. 15025

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD WENER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOLLY WENER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitions to Review Decisions of the Tax Court of the United States.

PETITIONERS' REPLY BRIEF.

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Petitions to Review Decisions of the Tax Court of the United States.

PETITIONERS' REPLY BRIEF.

I.

The Arrowsmith Case Relied Upon by the Respondent Is Clearly Distinguishable and Is Not Applicable to the Facts of This Case.

The original sale by the Petitioners of their partnership interests in February, 1947 was a transaction constituting a capital loss. The troublesome problem presented to this Court is where at some subsequent date the taxpayer who

sustained such a capital loss may have expenses or additional losses or income applicable to the earlier capital transaction. The question whether the later event is to be treated as a transaction completely separate from the earlier capital one or as a mere continuation of the original capital gain or loss has resulted in conflicting decisions in the courts of the United States.

The Supreme Court in settling a dispute as to the treatment of corporate debts paid by the stockholders after liquidation has solved one facet of this problem by its decision in the case of *Arrowsmith v. Commissioner,* 344 U. S. 6 (1952), relied upon by the Respondent. Unfortunately, that decision does not solve the question presented to this Court by the cases under review.

The *Arrowsmith* case, *supra,* holds that the losses sustained by shareholders from paying a judgment against a dissolved corporation, of which they were the liquidating-distributees, must be treated as capital losses. The reasoning of the Court was that the losses incurred were the result of the shareholders' transferee liability arising out of the liquidation, and since the liquidation was an "exchange" under Section 115(c) of the 1939 Internal Revenue Code, it followed that the loss should be a capital loss deducted under Section 23(g) of the 1939 Code. That case can be clearly distinguished from the facts of the cases under consideration in that it involved losses arising from the statutory liability of the recipient of a corporation's assets upon liquidation. The obligation of the distributee-shareholders to pay the judgment against the liquidated corpo-

ration was not based on any ordinary business transaction apart from the liquidation. The Court reasoned that if the judgment had been rendered against the corporation prior to liquidation it would have reduced the amount of corporate assets available for distribution upon liquidation to the shareholders with the resultant reduction in their capital gains from the transaction. It should be noted that the losses were the result of an absolute liability imposed upon the shareholders, flowing directly from the liquidation. In the cases under consideration the losses sustained by the Petitioners were not obligatory and were not the result of a legal liability arising out of the original capital transaction.

Because of the statutory derivative liability of the shareholders in the *Arrowsmith* case, *supra,* the capital transaction involved, namely, the exchange of stock for corporate assets, was not completed or finally determined until such time as the shareholders were relieved of their derivative liability by operation of law. In contrast, the sale by the Petitioners of their partnership interests was fully completed and closed on the date of the original transaction, and there was no future or contingent liability arising out of the original transaction to which they might be subject.

The *Arrowsmith* case can be further distinguished on the ground that the subsequent losses sustained by the shareholders were in effect, part of the consideration paid by them for the assets of the corporation, and hence a capital loss. (*Holdcraft Transportation Co.,* 153 F. 2d 323).

It is manifest that the *Arrowsmith* decision is limited to losses resulting from statutory liability arising out of the original transaction. It is further distinguishable in that it does not involve losses arising from the cancellation of indebtedness. The shareholders in the *Arrowsmith* case occupied the position of debtors who were legally compelled to pay a sum of money several years after the capital transaction which gave rise to their obligation to pay. On the other hand the Petitioners are creditors who voluntarily sustained losses by the cancellation of certain amounts of money which were owed to them. Certainly this distinction alone should be sufficient to hold that the *Arrowsmith* decision is inapplicable to the facts in this case. To extend the *Arrowsmith* rationale to all subsequent transactions that result in a gain or loss and that are related either directly or indirectly, to a prior capital transaction, would be unjustifiable and possibly result in creating more conflict or confusion in connection with the problem presented by this case than has heretofore existed. It must be kept in mind that many capital transactions are followed at some later date by a subsequent agreement involving the parties to the original transaction, the tax effect of which may come into question. A blanket application of the *Arrowsmith* decision to all subsequent transactions resulting in a gain or loss may prove to be undesirable to the taxing authorities under other circumstances. It should also be kept in mind that the *Arrowsmith* decision was reviewed by the Supreme Court to resolve a conflict between decisions of two circuits of the Court of Appeals on practically identical facts. For this reason it is submitted that the decision in the *Arrowsmith* case must be limited to the facts involved in both those cases and should not be extended to the different facts found in the case under consideration.

II.

The Settlement Transaction of August, 1947, Was Not a Renegotiation of the Executory Provisions of the Original Sale Contract and Its Nature Should Not Be Determined by Referring to the Original Sale Which Gave Rise to the Indebtedness.

The Respondent has taken the position that the settlement agreement of August, 1947 must be viewed as a renegotiation or modification of the original sale of February, 1947 between the Petitioners and their old partners. The Respondent is unable to cite any cases supporting this position but argues that merely because the balance of the purchase price was unpaid, therefore, any subsequent transactions between the parties to the sale must be construed as part of the original transaction. However, the Respondent fails to take into consideration the fact that the original transaction of February, 1947 was a completed transaction and he admits this fact in his brief. Further, for tax purposes it was a closed transaction and the Petitioners correctly reported the capital loss they sustained. Yet the Respondent would have the Court believe that simply because the balance of the purchase price was to be paid in installments, that any subsequent transactions between the parties must be construed as part of the original transaction which admittedly is completed and closed for all other purposes.

This reasoning of the Respondent completely overlooks the express provisions of the Mutual Release entered into between the Petitioners and their old partners in August of 1947. [R. 35-38.] That agreement makes absolutely no mention of the original capital transaction of February, 1947. Nothing in its terms indicates an intention of the parties to modify or adjust the sale. This fact is quite

important in determining the validity of the Respondent's argument that the August transaction was a renegotiation of the sale of the partnership interests in February, 1947. In fact the Mutual Release clearly indicates by its express terms that it is no more than an actual cancellation of indebtedness.

The Respondent also contends that the effect of the acceptance of a lump cash payment by the Petitioners in August of 1947 in lieu of installment payments was to supersede the provisions of the original sale contract of February, 1947. This oversimplification of the effect of the August transaction overlooks the fact that the only act remaining to be done under the original contract was the payment of the balance of the purchase price. The relationship between the buyers and the Petitioners was that of debtor and creditor only. There was no security retained by the Petitioners. It is submitted that the acceptance by an unsecured creditor of a sum less than the amount owed to him in installment payments is not in itself a renegotiation or modification of the original transaction which gave rise to the indebtedness. The effect of such a transaction is the satisfaction of indebtedness by a lump sum payment and a cancellation of the unpaid balance. There is in fact no modification or revision of the original obligation to pay money by the acceptance of a lesser sum. The Respondent's contention that the settlement agreement of August was one of a series of acts in one entire transaction is completely without foundation or logic. Merely because a creditor, subsequent to the completed sale of a capital asset, chooses to accept a sum in cash less than the balance of the purchase price owing to him does not compel the conclusion that such a settlement is the final step in the prior sales transaction which is admittedly completed.

The Petitioners agree with the Respondent that the *Arrowsmith* case may well be an example of a series of transactions which must be viewed as a whole because of the statutory derivative liability imposed upon the taxpayers in that case. The Respondent points out in his brief that the payment of the judgment by the shareholders in the *Arrowsmith* case was one of the steps in the liquidation of the corporation, and was legally and logically related to the prior capital transaction. It is submitted that such is not the case at hand for the reason that the compromise of August, 1947, was not a legal obligation or liability arising out of the February sale. There was no such binding or direct relationship between the two transactions. The two situations are entirely different in nature and concept.

The case of *Sanders v. Commissioner,* 225 F. 2d 629 (C. A. 10th Cir.), cited by the Respondent is clearly inapplicable for the reason that it involved simply the compromise of a claim for construction work against the Government. The taxpayer settled his claim and received the agreed amount in compromise. He contended it should be treated as a capital gain but the Court properly held that any income he might have received under the original construction contract would be ordinary income, and there was no reason to treat the sum he received in compromise any differently. That case does not involve an original capital transaction, and a subsequent transaction arising out of the prior capital sale. If at some future date the Government had recovered part of the monies paid to the taxpayer, or if the taxpayer had been compelled to pay some unexpected or contingent liability arising out of the construction contract, then a situation similar to the case at hand would have arisen.

The Respondent cites three other cases in support of his contention that the nature of a later transaction is determined by referring to the original transaction. These cases are *Hirsch v. Commissioner,* 115 F. 2d 656 (C. A. 7th Cir.); *Helvering v. A. L. Killian Co.,* 128 F. 2d 433 (C. A. 8th Cir.); and *Pinkney Packing Co. v. Commissioner,* 42 B. T. A. 823. The *Hirsch* and *Killian* cases can be distinguished on the grounds that they involved the question of whether the cancellation of indebtedness was income to the purchaser, rather than a loss to the seller. These two cases are further distinguishable for the reason that the court relied heavily upon the depreciation in the value of the property during the depression years. Those cases stand for the proposition that where the value of the property sold depreciates to an amount less than the balance of the purchase price owed by the taxpayer, a reduction of the purchase price to the current value of the property does not result in taxable income to the purchaser-taxpayer.

The Respondent contends in his brief that this case is not the ordinary case of a satisfaction of indebtedness by the payment of a lesser sum but rather a complete adjustment in the terms of the original contract of sale. Yet the findings of the Tax Court do not indicate that there was any modification or change of the original sales contract other than the acceptance by the Petitioners of the sum of $35,000.00 in cash in complete satisfaction and discharge of $58,260.13 owed to them over a period of years. Contrary to the express finding of the Tax Court, and strangely not mentioned or considered at all in its opinion, is the express agreement in the Mutual Release of August, 1947, by the Petitioners to forgive and cancel the balance of the obligation owed to them, namely,

$23,260.13. It is difficult to understand how such an agreement can be construed as a matter of law as anything but an accord and satisfaction with the resulting cancellation of the unpaid portion of the purchase price. In that regard it is interesting to note that the Respondent causally dismisses the authorities cited by the Petitioners in their opening brief as being "inapposite to the factual situation at hand since here there is not a simple compromise or cancellation of indebtedness."

It apparently is the position of the Respondent that whenever there is a sale of a capital asset with the purchase price to be paid in installments over a period of time, that any compromise between the buyer and seller at a later date, where the seller accepts a lump sum payment in lieu of waiting for the installment payments, is not a cancellation of indebtedness but rather a complete renegotiation of the unexpected portions of the sales contract. Carrying this reasoning to its logical conclusion, there could never be any true cancellation of indebtedness arising out of the sale of a capital asset, for until the entire purchase price was paid the contract would still be executory. It is submitted that this position is not based on reason or logic; it represents a misleading attempt by the Respondent to label the settlement transaction of August 1947 as something different than what it really was, namely, a simple accord and satisfaction with a resulting cancellation of indebtedness.

III.

Even if the Tax Court Was Correct in Holding That the Petitioners Sustained Only Capital Losses, They Should Be Fully Deductible as a Business Loss.

The Petitioners have shown under Point III of their opening brief that the losses sustained by them as result of the August 1947 transaction are fully deductible as ordinary losses under Section 23(e) of the 1939 Internal Revenue Code.

It should be noted that in practically all of the cases cited by the Petitioners in their opening brief the Courts have held that the loss sustained by a creditor upon the compromise of indebtedness is an ordinary loss deductible in full even when the loss arose from the sale of a capital asset. (See I. T. 4018 (1950), 2 C. B. 20.)

It is the contention of the Petitioners that the losses sustained by them as a result of the August 1947 transaction were necessitated by and directly related to their new business in California. However, if the Court should decide that these losses are capital in nature then, in the alternative, the Petitioners urge the Court to allow such losses in full as having been incurred for a business purpose as stated in Petitioner's opening brief.

The Respondent contends that the *Hutcheson* and *Gannon* cases cited by the Petitioners in their opening brief do not support the Petitioner's position for the reason that those cases involved losses incurred in a trade or business. Those cases involved the surrender of a partnership interest by the taxpayers which was held by the Tax Court to be an ordinary loss even though the abandonment or surrender of a partnership interest is cer-

tainly not an activity associated with the conduct of any trade or business. It is submitted that if the forfeiture of such a capital asset can be deducted in full as an ordinary loss, then certainly the loss resulting from the cancellation of indebtedness by the Petitioners should be deductible in full, not only because the loss was directly related to a partnership interest in a manufacturing business, but also because the loss was necessitated by sound business reasons.

Conclusion.

In view of the arguments and reasoning set forth in this reply brief, the Petitioners sincerely urge the Court to hold that the *Arrowsmith* case is not applicable to the facts of this case, and that the losses sustained by the Petitioners were ordinary losses deductible in full.

Respectfully submitted,

FRANKLIN K. LANE, III, of
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August 1, 1956.

No. 15,025

In the United States Court of Appeals for the Ninth Circuit

HAROLD WENER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

MOLLY WENER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Tax Court's findings of fact and opinion (R. 40-47) are reported at 24 T.C. 529.

JURISDICTION

These petitions for review (R. 49-53) involve federal income taxes for the taxable year 1947. On December

21, 1951, the Commissioner mailed to the taxpayer Harold Wener notice of a deficiency in the total amount of $5,279.53 (R. 7-11), and to the taxpayer Molly Wener notice of a deficiency in the total amount of $238.59 (R. 17-20). Within ninety days thereafter and on March 19, 1952, the taxpayers filed petitions with the Tax Court for redeterminations of these deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939 (R. 3-11, 12-20.) The decisions of the Tax Court were entered on September 2, 1955. (R. 48-49.) These cases were brought to this Court by petitions for review filed December 2, 1955. (R. 49-53.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly upheld the Commissioner's determination that the taxpayers sustained capital losses within the meaning of Sections 23(g) and 117 of the Internal Revenue Code of 1939 where they sold capital assets, partnership interests, for a stated amount to be paid in installments, and later in the same taxable year, because they needed cash, reduced through renegotiation the original purchase price and accepted in complete satisfaction an immediate cash payment in an amount which was less than the aggregate of the remaining installment payments due.

2. If the Tax Court erred in holding that the taxpayers sustained capital losses, whether the taxpayers have shown that their losses were deductible as ordinary losses "incurred in trade or business" within the meaning of Section 23(e) of the 1939 Code.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

* * * * *

(g) *Capital Losses.*—

(1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) [as amended by Sec. 115(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or bus-

iness), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1); or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer;

* * * * *

(d) *Limitation on Capital Losses.*—

* * * * *

(2) [as amended by Sec. 150(c) of the Revenue Act of 1942, *supra,* and Sec. 8(d)(2) of the Individual Income Tax of 1944, c. 210, 58 Stat. 231] *Other taxpayers.*—In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer of [*sic*] $1,000, whichever is smaller. For purposes of this paragraph, net income shall be computed under Supplement T, "net income" as

used in this paragraph shall be read as "adjusted gross income".

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The facts as stipulated and found by the Tax Court may be summarized as follows:

The taxpayers, husband and wife, were members of a partnership doing business in Illinois and Wisconsin, as the Boreva Sportswear Company. (R. 41.) After differences arose between the taxpayers and the other partners, on September 6, 1946, a Dissolution Agreement was executed wherein it was agreed that the taxpayers would retire from the partnership as of January 31, 1947, the remaining partners to purchase their interests. The Dissolution Agreement provided generally that the sums to be paid for the taxpayers' interests by the remaining partners were to be measured by the book values of their interests as of the severance date plus a specified sum. (R. 42.) The agreement also provided that payments to the taxpayers for their partnership interests were to be made on an installment basis: An initial payment on or before thirty days from January 31, 1947, one on or before January 31, 1948, another on or before April 15, 1948, and the final payment on or before April 15, 1950. Interest was to run on all payments except the first. (R. 42-43.)

The taxpayers' interests in Boreva were conveyed under a bill of sale dated February 1, 1947, as of the close of business on the preceding day. (R. 43.)

After the initial payments were made, there was a balance of $38,713.86 due the husband and $19,564.27

due the wife to be paid in the three remaining installments. (R. 43-44.)

Subsequent to their agreement to withdraw from Boreva, the taxpayers moved to California where they established a business. (R. 44.)

Also in 1947, on August 25, before any further payments were due from the sale of their interests in Boreva, the taxpayers, in consideration of an immediate cash payment, accepted and received $35,000 in complete satisfaction of the aggregate amounts which would have become payable to them on the various installment dates. The husband's share of this sum was $23,257.50 and that of the wife was $11,742.50. (R. 44.)

One factor which prompted the taxpayers to initiate the negotiations which resulted in the adjustment of the terms of the original sales agreement was their present pressing need of funds for use in their new California business. (R. 44.)

Under the agreement for immediate payment the husband received $15,456.36 less and the wife $7,803.77 less than would have been due them had the original terms of the agreement been followed. In their returns for 1947 the taxpayers treated these amounts as ordinary losses, deductible in full. (R. 44-45.)

The Commissioner, however, determined that the losses were capital losses under the statute and subject to the limitations provided therein. (R. 45.)

The Tax Court sustained the Commissioner's determination of deficiencies (R. 48-49), holding that the losses were sustained by the taxpayers from the sale of their capital interests in the partnership (R. 46). From that decision the taxpayers here appeal. (R. 49, 51.)

SUMMARY OF ARGUMENT

There is no dispute that in February, 1947, when the taxpayers formally conveyed their interests in Boreva Sportswear to their old partners, a capital loss was sustained. The principal question for consideration in this case is whether the additional loss which the taxpayers suffered when they renegotiated their February agreement in order that they might receive an immediate cash payment rather than wait for installment payments was a capital loss.

The additional loss sustained as a result of the August transaction resulted simply from an adjustment in the terms of the original agreement of February and the later transaction must be viewed as one step in the total sale by the taxpayers of capital assets, their partnership interests. Well within the same year that the conveyance of the partnership interests was made, and in which the initial payment was received, the taxpayers decided to renegotiate the installment payment provisions which were the unexecuted portions of the sales contract, and to accept a present cash payment in lieu of later installment payments. The effect of this action was to supersede the provisions of the contract which had originally prescribed the terms, dates and amounts of payments by renegotiated provisions providing for prompt payment. Since admittedly the acts of the taxpayers in February resulted in the sale or exchange of a capital asset, a modification of the February transaction later in the same year must of necessity partake of the same nature as the February transaction.

There are ample decisions that support the Commissioner's contention that where a single transaction such

as this takes place in a sequence of events, in order to determine the nature of the final step one must first consider the original steps of the transaction. Another long line of cases hold under certain circumstances that a cancellation or compromise of indebtedness simply resulted in a "readjustment of the purchase price" of the property for which the debt was incurred.

The Tax Court held that the February and August transactions were completely interwoven when it stated that the effect of the later transaction was to supersede the earlier. There is not present in this case the ordinary situation of a satisfaction of an indebtedness for a lesser amount, but rather a case which clearly presents, under the facts as found by the Tax Court, an instance of a complete adjustment in the terms of the original executory contract of sale of a capital asset.

If the Court should hold that the loss is not a capital loss, then it is necessary for the taxpayers to show that they fall within some specific provision of the Internal Revenue Code allowing a deduction for such loss as an ordinary loss. This they have failed to do.

The cases cited to the effect that a compromise or cancellation of indebtedness result in income to the debtor have no bearing on whether or not the same compromise or cancellation of indebtedness results in a deductible loss to the creditor since what may be income reportable by a debtor is not necessarily a loss *deductible* by the creditor. It is well established that deductions from gross income are a matter of legislative grace. There is, moreover, no basis to taxpayers' contention that the loss in question was incurred in a trade or business and that it is therefore deductible under Section 23(e)(1) of the Code.

Adopting, for the purposes of argument, the view of taxpayers that the August transaction must be considered separate and apart from anything that occurred earlier, it is difficult to see how they attach the loss to a trade or business. The claim which was held was completely unrelated to any business which the taxpayers happened to be in at the time that the loss was incurred. And the mere fact that they happened to be in financial difficulties in a new and unrelated business which was established subsequent to the sale of the partnership interests does not serve to relate this particular claim to the new business which was formed after the claim arose. The fact that the taxpayers needed capital for their new business does not make the loss in August a loss of the new business. In order to be deductible under Section 23(e)(1) of the Code a loss must be the proximate result of the business enterprise. From the agreed facts it can be seen here that this loss did not arise out of the California enterprise but was a result of a series of transactions concerning the sale of interests in a separate and distinct partnership which operated in a different locality. Furthermore, the sale of these partnership interests did not constitute a trade or business of taxpayers. What the taxpayers desired to do with the proceeds of the sale is not material herein, and the mere fact that they used the proceeds as capital in their new and unsteady enterprise is of no consequence.

Since the loss in question was not a loss incurred in trade or business, the taxpayers are not entitled to deduct any portion of the loss unless the Commissioner's position that this was a loss in the sale of a capital asset

is upheld, and then only the portion provided by the statute.

It is therefore submitted that the decision of the Tax Court was correct and should be affirmed.

ARGUMENT

I

The Taxpayers Sustained a Capital Loss Where They Renegotiated an Executory Agreement to Sell Partnership Interests and Accepted in Consideration of an Immediate Cash Payment an Amount Which Was Less than the Total Remaining Installment Payments

There is no dispute that in February, 1947, when the taxpayers formally conveyed their interests in Boreva Sportswear to their old partners, a small capital loss was sustained. (Br. 6, 19.) The principal question for consideration in this case is whether the additional loss which the taxpayers suffered when they renegotiated their February agreement in order that they might receive an immediate cash payment rather than wait for installment payments was a capital loss within the meaning of Sections 23(g) and 117 of the Internal Revenue Code of 1939. If, as the taxpayers contend, this was not a capital loss, then, as we discuss under Point II, *infra,* it is incumbent upon them to prove that it was an ordinary loss "incurred in trade or business" within the meaning of Section 23(e)(1) of the 1939 Code before they are entitled to deduct it.

A. *The transaction in August, 1947, was an adjustment of the purchase price and payment dates of the executory contract of sale dated February, 1947, and its nature is determined by relating back to the February portion of the transaction*

It is the position of the Commissioner that the additional losses of $15,456.36 and $7,803.77 sustained by

the taxpayers, Harold and Molly Wener, respectively (R. 45), as a result of their transaction in August, 1947, resulted simply from an adjustment in the terms of the original agreement of February, 1947, and that the August transaction must be viewed as one step in the total transaction, *viz.,* the sale by taxpayers of capital assets, their partnership interests. The taxpayers contend that the August transaction must be considered in a vacuum, with no reference at all to the part of the transaction which took place in February. They agree that for at least the February part of the transaction they suffered a capital loss. (Br. 6, 19.) That there is neither rhyme nor reason for viewing two such related transactions as entirely independent transactions may be seen by considering the situation as it stood immediately prior to the readjustment effected in August, 1947. As of that date the taxpayers, Harold and Molly Wener, had received only initial payments for their interests in the partnership in the amounts of $10,428.28 and $5,265.13, respectively. (R. 43.) The contract of sale of these interests was still unexecuted as far as concerned payment of the balance of the purchase price, namely, $38,713.86 and $19,546.27, due Harold and Molly Wener, respectively, in installments over three years. (R. 42-44.) Well within the same taxable year that the conveyance of the partnership interests was made, and in the same year in which the initial payments for such interests were received, the taxpayers decided to and did renegotiate and revise the unexecuted portions of the sales contract, the installment payment provisions, and thereby accepted present cash payments of $23,257.50 and $11,742.50, respectively (R. 44), in

lieu of later installment payments.[1] The effect of this action was to supersede the provisions of the contract which had originally prescribed the terms, dates and amounts of payments by renegotiated provisions providing for prompt payment. Since admittedly the acts of the taxpayers in February resulted in the sale or exchange of a capital asset, a modification of the February transaction later in the same year must of necessity partake of the same nature as the February transaction. If what happened in February resulted in a capital loss, then the modification of the February agreement in August and the concomitant complete adjustment in the terms thereof must likewise result in capital loss. The nature of the loss which resulted in August can be determined only by reference to the original transaction which took place in February.

While there do not appear to be any decided cases completely in point to that presently at the bar, there are ample decisions that tend to support the Commissioner's contention that where a transaction such as this takes place in a sequence of steps, to determine the nature of the final step, one must first consider the original step of the transaction. In this respect, the decision of the Supreme Court in *Arrowsmith* v. *Commissioner,* 344 U.S. 6, is a strong buttress to the Commissioner's position. The *Arrowsmith* case involved various steps in the liquidation of a corporation. In 1940 the corporation made its final distribution in liquidation and the taxpayer distributees reported capital gains thereon. The liquidation was

[1] The taxpayer agrees (Br. 5-6) that the obligation under the contract was not represented by a note or other evidence of indebtedness, and was merely an unsecured contractual obligation to pay a certain sum of money in installments over a period of time.

considered a closed transaction at this time. In 1944 a judgment was rendered against the liquidated corporation for which the taxpayers were liable since they were transferees of the assets of the corporation. The taxpayers paid this judgment and each classified the loss as an ordinary business loss for which they took a full deduction. The Commissioner, taking the position that the nature of the transaction related back to the original liquidation, held that the 1944 payment was a part of the original liquidation transaction which was a capital transaction and thus required classification as a capital loss just as the taxpayers had treated the original dividends in liquidation as capital gains. The Supreme Court affirmed the Commissioner's determination and held that the loss sustained was a capital loss. In reaching this decision the Court first determined that the taxpayers were required to pay the judgment because of the liability imposed on them as transferees of the liquidation distribution assets, and that this payment was one of the steps in the liquidation of the corporation. The Court then stated that it was necessary to consider each of the various events in the liquidation process in order to classify properly the nature of the 1944 loss for tax purposes. Since the liquidation as a whole resulted in capital gain, then this individual payment resulted in capital loss rather than an ordinary loss. In addition, it was pointed out that if the payment in question had been made in 1940, the year of the final distribution in liquidation, then its effect would simply have been to reduce the amount of capital gains which the taxpayers received during that year. Correspondingly, if the taxpayers in the instant case had decided in February

of 1947, at the time they conveyed their interests, that they were going to desire an immediate cash payment for their partnership interests rather than abide by the installment payment provisions originally contemplated, it cannot be disputed that the entire loss would have been a capital loss. In this case the Tax Court found (R. 46-47) that the August transaction was part and parcel of the original capital transaction which took place in February of the same year. Thus the rationale of the holding in the *Arrowsmith* case that the 1944 loss was a part of the original liquidation process is clearly applicable. The holding in *Arrowsmith* becomes even more potent in support of the Commissioner's position in this case when it is considered that in *Arrowsmith* the taxpayers argued strenuously, supported by previous decisions (see, e.g., *Commissioner* v. *Switlick,* 184 F. 2d 299 (C.A. 3d)), that to classify the 1944 loss as part of the liquidation process of earlier years would be to fly in the teeth of the annual accounting concept. The holding that the annual accounting concept was not breached by considering the nature of the transaction which took place in the earlier year in order to classify the later transaction carries the necessary implication that in a sequence of events, *all occurring within a single year,* a loss resulting from a modification of an executory contract previously entered into will *a fortiori* be classified as capital or ordinary by relating back to the nature of the original transaction. If there may be a relating back to an earlier year to determine the nature of a transaction there surely is more reason for allowing a relating back to a transaction in the *same* taxable year.

Another illustration of the propriety of relating back to the original transaction in order to determine the nature of a subsequent part of such transaction is set forth in *Sanders* v. *Commissioner,* 225 F. 2d 629 (C.A. 10th), certiorari denied, 350 U.S. 967, where the taxpayer compromised an unliquidated claim under a construction contract against the Government. As against the taxpayer's argument that the sum received in compromise was a capital gain, it was held instead to be ordinary income. The court, in deciding that a sale or exchange of a capital asset had not taken place, reached this decision by considering the income in the light of the claim from which it was realized. Since the original claim was for services performed, and if the claimed sums had been paid when due ordinary income would have been received, the court in relating the settlement back to the original transaction, held that the transaction was not a sale or exchange of a capital asset but rather was the receipt of ordinary income.

Still another line of cases view a later transaction in the light of an original transaction. These are the "readjustment of purchase price" cases and it is submitted that their reasoning is pertinent to the present case. In *Hirsch* v. *Commissioner,* 115 F. 2d 656 (C.A. 7th), the taxpayer purchased in 1928 certain real estate, paying for it with cash and by the assumption of a mortgage debt on the property. By 1936 the property had depreciated in value to an amount less than the sum of the remaining mortgage payments. The mortgagee voluntarily reduced the amount of the mortgage indebtedness to the then value of the property. While the Commissioner contended that the reduction of the

mortgage indebtedness resulted in income to the taxpayer, the court refused to follow this reasoning and held that based on the particular circumstances of the case it could be seen that this transaction was in its essence a reduction of the original purchase price and therefore not income. It can be seen that the court refused to view as separate and apart the transactions of each year, and took all of the circumstances of the case into consideration. To like effect were the decisions in *Helvering* v. *A. L. Killian Co.,* 128 F. 2d 433 (C.A. 8th); *Gehring Publishing Co.* v. *Commissioner,* 1 T.C. 345; and *Pinkney Packing Co.* v. *Commissioner,* 42 B.T.A. 823. All of these decisions stand for the proposition that the transaction must be viewed in its entirety when the particular circumstances so warrant, and that a sale of property and the debt which arises from the sale of property may not in every instance be considered completely divorced from each other for tax purposes. And so in the present case it is submitted that the facts offer no warrant for the position of the taxpayer that the sale of the partnership interests and the remaining installment payments due on these interests under the executory contract of sale must be severed in considering the nature of the loss arising from each transaction. Indeed, the Tax Court held that the February and August transactions were completely interwoven when it stated in its opinion (R. 46):

> After the initial payments, but later in the same year and before any of the installments had become due and payable, the petitioners, for reasons which were solely their own, saw fit to renegotiate the unexecuted portions of the sales agreement,

> namely, the deferred payment provisions, to the end that for a present cash payment in lieu of later payments in installments, as theretofore provided, the petitioners agreed upon and accepted reduced prices for their interests in Boreva. These renegotiated provisions superseded the provisions which had originally prescribed the terms, dates and amounts of payment, and the transaction was closed pursuant thereto.

And the taxpayer concedes (Br. 4) that the findings of the Tax Court accurately set forth the facts involved.

Faced with the problem of determining the correct basis upon which to figure depreciation in the taxpayer's plant, the Sixth Circuit in *Borin Corp.* v. *Commissioner,* 117 F. 2d 917, considered a problem analogous to that presently before the Court. In *Borin* the taxpayer in 1930 contracted with another company whereby the latter was to install machinery in the taxpayer's plant. Because of the unsatisfactory operation of this machinery, the taxpayer refused to make certain payments under the contract. After negotiations a substantial sum was allowed the taxpayer by way of adjustment, the renegotiation being handled by the execution of a new contract in 1932 between the parties. The taxpayer contended that the basis of his plant was the cost as represented by the first contract in 1930 and that the adjustment amount was by way of damages. The court, however, held that the effect of the 1932 contract was to rescind the 1930 contract and that the basis for depreciation was properly represented by the cost as set forth in the 1932 contract. See also *Des Moines Improvement Co.* v. *Commissioner,* 7 B.T.A. 279;

Chenango Textile Corp. v. *Commissioner,* 1 T.C. 147. It can be seen from the cited cases that the courts have refused to sever under legal fiction various steps in a single transaction which the circumstances show to be only parts of the overall transaction.

The theory of the taxpayer herein is that the August transaction was a cancellation of indebtedness resulting in an ordinary loss to the taxpayers. (Br. 7.) Yet there is no reason why the mere fact that a creditor-debtor relationship arising out of the executory contract existed between the taxpayers and their former partners at the time of the August renegotiation of the contract of sale should change the basic nature of the transaction. There is not present here the ordinary case of a satisfaction of an indebtedness for a lesser amount, but rather a case which clearly presents, under the facts as found by the Tax Court, an instance of a complete adjustment in the terms of the original executory contract of sale of a capital asset. If it is conceded (Br. 6, 19) that the original contract gave rise to a capital loss to the taxpayers, then it is submitted that the correct approach, both from the point of view of the applicable law and that of common sense, is to consider the second part of the transaction, the renegotiation in August, in the same light as the original February transaction. Therefore, it too resulted in a capital loss to the taxpayers.

If the view of the Commissioner is sustained in this respect, that the August transaction was part and parcel of the whole transaction which commenced in February, then it cannot be disputed that there was a sale or exchange of a capital asset. There is no controversy about the fact that there was a sale or exchange of the taxpayers' interests in Boreva Sportswear, nor is there

dispute that these interests constituted capital assets. Viewing the transaction as a whole it is evident that there was here a sale or exchange of a capital asset. The fact that this sale or exchange was effected by several steps in a transaction, rather than at once, does not make it any the less a sale or exchange. The various cases cited by the taxpayer (Br. 10-13) for the point that a cancellation or compromise of indebtedness is not a sale or exchange of a capital asset are consequently inapposite to the factual situation at hand, since here there is not a simple compromise or cancellation of indebtedness but rather, as found by the Tax Court (R. 46), a complete renegotiation of the unexecuted portions of a contract for the sale of a capital asset.

The Commissioner therefore urges the Court that the sequence of events which started in February of 1947 and ended in August 1947 are all part of one transaction, as the Tax Court determined (R. 46-47), and that all losses sustained by the taxpayers as a result of this transaction are capital losses.[2]

II

Even if the Tax Court Erred in Holding that the Taxpayers Sustained Capital Losses, the August, 1947, Renegotiation of the Executory Contract of Sale Did Not Bring About a Loss "Incurred in Trade or Business" Within the Meaning of Section 23(e) of the 1939 Code

As has been pointed out above, the Commissioner concedes that the taxpayers are entitled to and he has allowed (R. 9, 19) the taxpayers a capital loss deduction for losses sustained in the renegotiation of their

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[2] The taxpayer to the contrary notwithstanding (Br. 10), the burden is on the taxpayer to show that the Commissioner's determination that this was a capital loss is erroneous.

executory contract for the sale of partnership interests. The taxpayers, however, contend that such a loss is not a capital loss. If the Commissioner is incorrect, and the loss is not a capital loss, then it is necessary for the taxpayers to show that they fall within some specific provision of the Revenue Code allowing a deduction for such loss as an ordinary loss. This the taxpayers have failed to do.

The cases cited by the taxpayers to the effect that a compromise or cancellation of indebtedness results in income to the debtor have no bearing on whether or not the same compromise or cancellation of indebtedness results in a deductible loss to the creditor, since what may be income *reportable* by a debtor is not necessarily a loss *deductible* by the creditor. It is well settled that deductions from gross income are matters of legislative grace. *White* v. *United States,* 305 U.S. 281. The taxpayers, moreover, contend that the loss sustained was a loss "incurred in trade or business" and is deductible under Section 23(e)(1) of the Code, *supra.* Adopting, however, for the purposes of argument, the taxpayers' view that the August transaction must be considered separate and apart from anything that occurred earlier, it is difficult to see how they attach the loss to a trade or business. The claim which the taxpayers held against their ex-partners was a claim completely unrelated to any business which the taxpayers happened to be in at the time that the loss was incurred. The mere fact that they happened to be in financial difficulties in a new and unrelated business which was established subsequent to the sale of their partnership interests does not serve to relate this particular claim to the new business which was formed after the claim arose. The fact that the taxpayers needed capital for their

new business does not make the loss in August a loss of that business. In order for a loss to be deductible under Section 23 (e) (1) of the Code as a loss incurred in a trade or business, it is obvious the loss must be the proximate result of the business enterprise. From the agreed facts it can be seen here that this loss did not arise out of the California enterprise but was a result of a series of transactions concerning the sale of interests in a separate and distinct partnership which operated in a different locality. Furthermore, the sale of these partnership interests did not constitute a trade or business of taxpayers. Finally, what the taxpayers desired to do with the proceeds of the sale is not material herein, and the mere fact that they used the proceeds as capital in their new and unsteady enterprise is of no consequence.

None of the cases cited by the taxpayers in support of their argument that the loss is deductible under Section 23(e)(1) present a factual situation akin to that presently before this Court. In *West Coast Securities Co.* v. *Commissioner,* 14 T.C. 947, the taxpayer was a corporation and the indebtedness which it compromised was a note which was acquired as an investment in the ordinary course of its business. Moreover, the deductibility of the loss was covered by the broad provisions of Section 23(f) of the Code. *Hutcheson* v. *Commissioner,* 17 T.C. 14, and *Gannon* v. *Commissioner,* 16 T.C. 1134, both present situations where retiring partners were not paid for their partnership interests, but forfeited certain interests upon retiring. As against the Commissioner's contention that such forfeitures resulted in capital losses, the Tax Court held that there was no sale or exchange of a capital asset as a result of the forfeiture, and accordingly held the losses to be ordi-

nary losses. The cases cited by the taxpayers all present instances of losses incurred in a trade or business, however, these cases are all far removed factually from the situation at hand. As we have indicated, the only trade or business in which the taxpayers were engaged in August, 1947, when they renegotiated their sales contract was in a newly established California enterprise. The fact that they incurred a loss in the sale of a capital asset because they needed money quickly to add to the capital of their new business does not make the loss incurred a loss of the new trade or business.

Since the loss in question was not a loss incurred in a trade or business, the taxpayers are not entitled to deduct any portion of the loss unless the Commissioner's position that this was a loss in the sale of a capital asset is upheld, and then only the portion provided by the statute.

CONCLUSION

For the reasons stated above, it is submitted that the decision of the Tax Court was correct and should be affirmed.

Respectfully submitted,

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No. 15,026

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, ITS AGENT, NATHAN FLEISHER, AND LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.,* set forth in relevant part in the Appendix *infra*), for the enforcement of its order issued against respondents on August 26, 1955, following the usual proceedings under Section 10. The Board's decision and order (R. 48-66)[1] are reported in 113 NLRB No. 123. This Court has juris-

[1] References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

diction of the proceeding under Section 10(e) of the Act, the unfair labor practices having occurred in Los Angeles, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondents, in violation of Section 8 (b) (4) (A) of the Act, induced or encouraged employees to engage in a concerted refusal to install "non-union" doors, manufactured by Paine Lumber Company, with an object of forcing their employer and others to cease doing business with Paine or to cease handling its products. The subsidiary facts upon which the Board based its findings may be summarized as follows:

A. *The business of the employers affected*

The unfair labor practices found by the Board arose out of respondents' inducement of employees of Havstad and Jensen to refuse to handle doors at the construction site of the White Memorial Hospital, in Los Angeles, California. Havstad and Jensen were engaged by the College of Medical Evangelists, a religious organization, as the general contractor for the construction of the hospital and other buildings on the college campus (R. 17; 124-125, 187-188). The doors in question were manufactured by Paine Lumber Company of Oshkosh, Wisconsin, and were obtained by Havstad and Jensen from Watson and Dreps, millwork contractors in Los Angeles. Watson and Dreps, in turn, had purchased the doors from Sand Door and Plywood Company, which is engaged in the wholesale jobbing of plywood doors and allied building materials

in the Los Angeles area and is the exclusive Southern California distributor for Paine (R. 16-17; 169-171, 173-174, 184-185).

In 1953, the value of shipments of materials, including doors, from Paine in Wisconsin to Sand Door in California, amounted to $185,796.84, and from January 1, 1954, through September 8, 1954, such shipments amounted to $103,503.05 (R. 17; 172-173). The doors in controversy have a value of $9,148.32. They were received by Sand Door from Paine early in August 1954, whereupon Sand Door notified Watson and Dreps, who picked them up and delivered them to the construction site by August 17 (R. 18; 173-175, 185, 198).

B. *The unfair labor practices*

On August 17, 1954, the Paine doors having been delivered to the construction site, Havstad and Jensen's carpenter foreman, Steinert, in accordance with instructions from Superintendent Nicholson, assigned laborers to distribute the doors from floor to floor, and directed carpenter Sam Agronovich to start hanging the doors (R. 18; 110-112, 163-165). Later that morning, Nathan Fleisher, business agent of respondent Local 1976, came to the building site and told Steinert that the men would have to stop hanging the doors, which did not have a United Brotherhood of Carpenters' label, until it was determined whether or not they were union doors (R. 18, 52-53; 165-166).

Steinert, as was required of carpenter foremen under respondent District Council's By-Laws and Trade Rules, was a member of a constituent local of the District Council, respondent Local 1976 (R. 53; 199, 162-163). As a foreman member of the Union he was

vested with the authority and responsibility to enforce the district Council's By-Laws and Trade Rules, which included the rule barring union members from handling nonunion materials (R. 53; 199). Accordingly, upon receiving orders from Fleisher, Steinert immediately stopped the employees from distributing the doors to the different floors (R. 53; 165). Then, accompanied by Fleisher, Steinert went to carpenter Sam Agronovich and told him to discontinue hanging the doors because they were not union made (R. 18, 53; 165-166).

About 11 a.m., James Nicholson, general superintendent of construction for Havstad and Jensen, arrived at the job site and learned that the doors were not being hung (R. 18-19; 106, 113-116). Nicholson walked up to Business Agent Fleisher, who was talking with Steinert and carpenter Finkelstein, and asked why he had stopped work on the doors (R. 19, 54; 116-118). Fleisher replied that he had "orders from the District Council that morning to stop them from hanging the doors" and that he "could have pulled them off yesterday but . . . waited until today" (R. 54; 117). At this point, carpenters Sam Agronovich and Saul Agronovich (who was also union steward) approached. Superintendent Nicholson told them that they might as well pick up their tools, but upon reconsideration told Steinert to assign them to other work. (R. 19; 117-119).

On that day and the next, James Barron, vice president and general manager of Sand Door, had telephone conversations with Earl Thomas, a representative of respondent District Council, who advised him that they had checked with a local of the Union in Wisconsin and found that the doors were not union made (R. 19; 175-180). Though Barron pointed out that Sand Door, Wat-

son and Dreps, and Havstad and Jensen all hired union men and were therefore innocent bystanders, Thomas insisted that they could not permit the hanging of the nonunion door and suggested that Sand Door had better cancel its orders with Paine and buy union doors (R. 19; 178-179). Barron also talked to Business Agent Fleisher, who told him that the doors did not have a union label and that they would have to be "cleared" before they could be hung (R. 19; 181-184). Emmett Jensen of Havstad and Jensen also talked to District Council Representative Thomas, who told him that, since they had ascertained that the doors were nonunion, the carpenters would not be able to hang them (R. 19; 190-191).

Thereafter, on October 5, Superintendent Nicholson and Steinert asked each carpenter employee on the hospital job if he would be willing to hang the doors (R. 20; 120-121, 138-150, 166-167). Each of the carpenters replied, in substance, that he would not unless clearance was obtained from the Union (*ibid.*).

At the time of the foregoing events, there was in effect a labor agreement negotiated between respondents' parent, United Brotherhood of Carpenters, and the Building Contractors' Association of Southern California, of which Havstad and Jensen were members. This agreement provided, *inter alia,* that "Workmen shall not be required to handle nonunion material" (R. 17-23, 57; 203).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board, with two members dissenting from these conclusions, held that it would effectuate the policies of the Act to assert juris-

diction in this case, and that respondents' activities had violated Section 8 (b) (4) (A) of the Act (R. 48-80). Thus, the Board found that respondents had induced the employees of Havstad and Jensen to engage in a concerted refusal to install nonunion doors manufactured by Paine, with the objects of forcing Havstad and Jensen to cease using or handling Paine products and of forcing Sand Door to cease doing business with Paine (R. 52-57). In arriving at this finding, the Board rejected respondents' contention that there was no inducement of a concerted refusal within the meaning of Section 8 (b) (4) (A) since, under the outstanding contract between the builders and the Union (p. 5, *supra*), Havstad and Jensen had acquiesced in their employees' refusal to handle such doors (R. 57-63).

The Board's order (R. 64-66) requires respondents Local 1976 and the District Council and their agents, including respondent Fleisher, to cease and desist from the unfair labor practices found and to post appropriate notices.

SUMMARY OF ARGUMENT

I

The Paine Lumber Company, whose products were the ultimate target of respondents' actions, ships materials value in excess of $100,000 per annum, from its plant in Wisconsin to its Southern California distributor, Sand Door. Respondents, by barring the use of these products on the Havstad and Jensen hospital project in Los Angeles, thereby interfered with more than a *de minimis* flow of shipments into that state, which is sufficient to bring respondents' activity within the Board's legal jurisdiction.

The impact on commerce was also sufficient to warrant the Board in asserting jurisdiction as a matter of policy. The primary employer here was Paine, and its direct out-of-state shipments, exceeding $50,000, alone were more than sufficient to meet the criteria announced by the Board in *Jonesboro Grain Drying Co-operative,* 110 NLRB 481, 483-484, and *Jamestown Builders Exchange,* 93 NLRB 386, 387.

II

Aside from the two defenses considered hereafter, this case is essentially the same as *N.L.R.B.* v. *Washington-Oregon Shingle Weavers District Council,* 211 F. 2d 149 (C.A. 9), enforcing *Sound Shingle Co.,* 101 NLRB 1159. There, as here, the union induced its members to cease handling a product which was manufactured under conditions not favored by the union; the Board found, and this Court agreed, that such conduct was within the ban of Section 8(b)(4)(A) of the Act, even though the union did not have a specific dispute with the manufacturer of the disfavored product.

A. Respondents' principal defense is that the inducement of the employees of Havstad and Jensen to stop handling Paine doors was not violative of Section 8(b)(4)(A) because here, unlike in *Shingle Weavers,* there was a contract between Havstad and Jensen and the Union wherein the parties had agreed that "Workmen shall not be required to handle nonunion material." This contention rests on the premise that employees cannot be induced to engage in a "concerted refusal in the course of their employment to . . . work on any goods," as those terms are used in Section 8(b)(4)(A), unless the work stoppage brought about by the union

is contrary to the wishes of the employer. For the following reasons, the Board properly rejected this contention:

1. Section 8(b)(4)(A) was intended to protect not only the particular neutral employer whose employees are induced by the union (i.e., Havstad and Jensen), but all other neutral employers (i.e., Sand Door, and Watson and Dreps) who, as a result of the union's action, are enmeshed in a dispute not their own. Moreover, that Section was intended "to protect the public from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes" (R. 60). To hold that a union's inducement of employee refusals to handle a product is not interdicted by Section 8(b)(4)(A) where their employer has acquiesced in this action, overlooks the interests of the other neutral employers and the public.

2. The legislative history of Section 8(b)(4)(A) indicates that Congress intended to ban the type of activity involved here, irrespective of employer consent to the union's program. Thus, Senator Taft specifically stated that the Section was designed to reach, *inter alia,* the practice of the United Brotherhood of Carpenters of having their members refuse to work on lumber or lumber products which did not bear that union's label. Since for years this policy has been implemented by arrangements and agreements between the union and employers of its members, it is reasonable to assume that Congress was well aware of the factor of employer acquiescence, and decided, notwithstanding that factor, to ban union inducement of employer refusals to work on an unfavored product.

3. The conclusion that employer consent does not in-

sulate union inducement of employees from the ban of Section 8(b)(4)(A) is consistent with the language of that provision. Section 8(b)(4)(A) prohibits the inducement of employees to engage in "a strike or a concerted refusal in the course of their employment to . . . work on any goods . . . , where an object thereof is (A) forcing or requiring any . . . employer or other person . . . to cease doing business with any other person." Read literally, the "concerted refusal" phrase proscribes inducing employees to refuse while at work, to perform a task which they would have done absent the inducement. There is no express qualification for cases where their employer has agreed to the refusal, nor is such qualification imported into the phrase by the other terms of the Section.

B. Respondents' second basic defense is that the action of carpenter foreman Steinert in stopping the handling of nonunion doors cannot be attributed to them because he was acting as an agent of Havstad and Jensen. However, Steinert was a member of respondent local, and was vested with the responsibility of enforcing its trade rules, including the one barring members from handling nonunion materials. Accordingly, when Business Agent Fleisher ordered Steinert to stop the work on the doors because they were nonunion, it was reasonable for the Board to conclude that Fleisher was invoking Steinert's obligations under the Union's rules and made him the Union's agent for their enforcement. This conclusion is confirmed by the fact that Fleisher made his request to Steinert instead of to General Superintendent Nicholson, the management official who normally dealt with Fleisher with respect to management-union matters.

ARGUMENT

I. THE BOARD PROPERLY ASSERTED JURISDICTION HERE

The facts summarized in the statement (pp. 2-3, *supra*) show that Paine Lumber Company, whose products were the ultimate target of respondents' actions, ships materials valued in excess of $100,000 per annum, from its plant in Wisconsin to its Southern California distributor, Sand Door. Respondents, by barring the use of these products on the Havstad and Jensen hospital project in Los Angeles, thereby interfered with more than a *de minimis* flow of shipments into that state, which is sufficient to bring respondents' activity within the Board's legal jurisdiction. See *N.L.R.B.* v. *Denver Bldg. & Construction Trades Council,* 341 U.S. 675, 683-685; *N.L.R.B.* v. *Local 74, United Brotherhood of Carpenters*, 181 F. 2d 126, 129-131 (C.A. 6), affirmed, 341 U.S. 707.[2]

However, even though a dispute may have a sufficient impact on commerce to be subject to the Board's jurisdiction as a matter of law, the Board may decline to assert that jurisdiction if the policies of the Act would best be served by conserving its budget and manpower for other cases with more substantial impacts upon commerce.[3] Before the Board, respondents

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[2] Insofar as the Board's legal jurisdiction is concerned, it is irrelevant that Havstad and Jensen obtained the products of Paine from an intermediary in California (Watson and Dreps), rather than by direct shipment from out-of-state. See *N.L.R.B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 242 (C.A. 9), cert. den., 326 U.S. 735; *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 382-383 (C.A. 9), cert den., 341 U.S. 909.

[3] See *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684; *Haleston Drug Stores* v. *N.L.R.B.*, 187 F. 2d 418, 421 (C.A. 9), cert. den., 342 U.S. 815; *Optical Workers Union* v.

contended that jurisdiction here should have been declined for these policy reasons. If this question is reviewable at all,[4] we submit that the Board was warranted in concluding that the policies of the Act would be effectuated by asserting jurisdiction in this case.

The Board has formulated criteria for ascertaining the cases in which jurisdiction would be asserted, and the two relevant here were enunciated in *Jonesboro Grain Drying Cooperative,* 110 NLRB 481, 483-484, and *Jamestown Builders Exchange,* 93 NLRB 386, 387. In the former case, the Board announced, *inter alia,* that it would assert jurisdiction over an enterprise which produces materials for direct out-of-state shipment, where the value of such shipment is $50,000 or more per annum. In the latter case, it stated that (93 NLRB at 387):

> in determining whether the Board will assert jurisdiction in cases in which secondary boycotts are alleged, we must consider not only the operations of the primary employer, but also the operations of any second[ary] employers, to the extent that the latter are affected by the conduct involved. Of course, if the operations of the primary employer alone meet the minimum requirements

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N.L.R.B., 227 F. 2d 687 (C.A. 5), pet. for rehearing den., 229 F. 2d 170, cert. den., 24 L.W. 3328; *Teamsters Local No. 183* v. *N.L.R.B.*, No. 14779 (C.A. 9), decided June 14, 1956.

[4] As this Court said in *N.L.R.B.* v. *Stoller,* 207 F. 2d 305, 307, cert. den., 347 U.S. 919:

> The general rule is that, where the Board has jurisdiction * * * whether such jurisdiction should be exercised is for the Board, not the courts, to determine.

See also, *Electrical Workers* v. *N.L.R.B.,* 181 F. 2d 34, 36 (C.A. 2), affirmed, 341 U.S. 694.

> under the Board's current policy, jurisdiction should be asserted without further inquiry. Where, however, the operations of the primary employer do not satisfy the Board's jurisdictional standards we must, in addition, consider the operations of the secondary employer . . . If, taken together, the business of the primary employer and that portion of the secondary employers' business which is affected by the alleged boycott meet the minimum standards, jurisdiction ought to be asserted.[5]

The instant case clearly satisfies these criteria. As the Board correctly noted (R. 51), in the case of a product boycott, even in the absence of an active dispute between the union and the manufacturer of the boycotted product, the manufacturer is a primary employer within the meaning of the *Jamestown* rule.[6] Thus, the primary employer here was Paine, and its direct out-of-state shipments exceeded the $50,000 minimum announced in *Jonesboro Grain, supra.* Accordingly, it was unnecessary under the *Jamestown* formula to consider the operations of any of the other (or secondary employers), the primary employer's

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[5] The business of the primary and secondary employers are combined in the case of a secondary boycott because "the secondary activity is but an extension of the labor dispute with the primary employer" (*N.L.R.B.* v. *Associated Musicians,* 226 F. 2d 900, 907 (C.A. 2), cert. den., 24 L.W. 3328). See also, *Jamestown Builders,* 93 NLRB at 387. Moreover, this procedure recognizes "that the real effect of a secondary boycott in the building and construction industry is the stoppage of the flow of building materials from the manufacturers to the dealers and thence to the contractors" (*Joliet Contractors Ass'n* v. *N.L.R.B.,* 193 F. 2d 833, 840 (C.A. 7)).

[6] See *Sound Shingle Co.,* 101 NLRB 1159, enforced, 211 F. 2d 149 (C.A. 9).

business alone being sufficient to warrant the Board in asserting jurisdiction.[7]

II. THE BOARD PROPERLY FOUND THAT RESPONDENTS VIOLATED SECTION 8 (b) (4) (A) OF THE ACT BY INDUCING EMPLOYEES OF HAVSTAD AND JENSEN TO REFUSE TO INSTALL PAINE DOORS

A. *Introduction*

Section 8 (b) (4) (A) of the Act, in relevant part, makes it an unfair labor practice for a labor organization or its agents:

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use . . . or otherwise handle or work on any goods, . . . materials . . . , where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using . . . the products of any other . . . manufacturer, or to cease doing business with any other person.

As we shall show, there is no serious question that Union member Steinert, pursuant to instructions from Business Agent Fleisher, induced employees to engage in a concerted work stoppage for the object proscribed

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[7] This conclusion is not impaired by the circumstance (see Member Peterson's dissent, R. 68-71) that, in certain other types of cases, the Board has declined, as a matter of policy, to assert jurisdiction where the business involved in the labor dispute is "twice removed" from interstate commerce (e.g., *Brooks Wood Products*, 107 NLRB 237). Since a secondary boycott is involved here, it cannot be said that Paine is "twice removed" from Havstad and Jensen (see n. 5, *supra*); the former is indeed the primary employer in the labor dispute, and, as it ships out-of-state, its business clearly exerts a direct impact on commerce.

by Section 8 (b) (4) (A). Respondents' principal defenses are: (1) that, though the employees of Havstad and Jensen may have been induced in concert to stop work, this was not a "refusal in the course of their employment," as contemplated by Section 8 (b) (4) (A), since their employer acquiesced in the employees' action; and (2) that respondents, in any event, were not responsible for Steinert's conduct because he acted as an agent of the employer rather than of the Union.

For reasons discussed at pp. 17-28, *infra,* we submit that the Board properly rejected these defenses. Before reaching these issues, however, we shall show (pp. 14-17, *infra*) that all of the elements of a violation of Section 8(b)(4)(A) are otherwise present here.

B. *The facts establish that Steinert induced a concerted work stoppage for an object proscribed by Section 8(b)(4)(A)*

As detailed at the outset (pp. 3-4), on the arrival of the Paine doors at the project, Havstad and Jensen's carpenter foreman Steinert, in accordance with instructions from Superintendent Nicholson, assigned laborers to distribute the doors from floor to floor of the hospital building, and directed carpenter Sam Agronovich to start hanging the doors. Later that morning, Business Agent Fleisher told Steinert that the men would have to stop handling the doors because they appeared to be nonunion. Thereupon Steinert, who, as a foreman member of the Union, was charged with the responsibility of enforcing its Trade Rule against working on non-union materials, ordered the laborers to stop distributing, and Sam Agronovich to

discontinue hanging, the doors. The men ceased work on the doors, and, when Superintendent Nicholson subsequently arrived on the scene, Fleisher replied, in the presence of Steinert and carpenter Finkelstein, that he had "orders from the District Council . . . to stop them from hanging the doors."

On these facts, the Board was fully warranted in concluding that Steinert, pursuant to instructions from Business Agent Fleisher, induced and encouraged the laborers and carpenters employed by Havstad and Jensen to engage in a concerted refusal to handle Paine doors. This is further emphasized by the fact that, when several months later the carpenters were asked to resume handling the doors, they replied that they would not unless clearance was obtained from the Union (p. 5, *supra*).

It is equally clear that the above-described work stoppage was for an object proscribed by Section 8 (b) (4) (A), i.e., to require Havstad and Jensen and, in turn, Sand Door to discontinue handling or dealing in Paine doors. Relevant in this connection is District Council representative Thomas' conversation with Barron of Sand Door a few days after Fleisher's visit to the hospital project. Barron pointed out that Sand Door, Watson and Dreps, and Havstad and Jensen all hired union men and thus were innocent bystanders. Thomas replied that, nevertheless, the Union could not permit the hanging of non-union doors He went on to suggest that, if Sand Door cancelled all stock orders and placed no further orders with Paine, clearance might then be obtained for the doors purchased for Havstad and Jensen and certain other stock on hand (pp. 4-5, *supra*).

Without merit is respondents' contention that the work stoppage was not for an object proscribed by Section 8 (b) (4) (A) because it was legitimate primary activity. The contention assumes that the purpose of the work stoppage was merely to require Havstad and Jensen to use union-made materials as contemplated by their contract with the Union (p. 5, *supra*), and that Paine could not have been the ultimate target of such activity since respondents had no active labor dispute with it.

The first assumption is rebutted by the fact that Business Agent Fleisher neither contacted the appropriate officials of Havstad and Jensen about the contract (see p. 27, *infra*), nor referred to it in directing Steinert to stop the men from handling Paine doors. It also overlooks the discussion *supra,* between Thomas and Barron, showing that respondents' interest extended beyond Havstad and Jensen.[8] In any event, as we show pp. 17-25, *infra,* the existence of the Havstad and Jensen contract would not privilege the measures taken by respondents to secure compliance therewith.

The second assumption, that a product boycott is not within Section 8 (b) (4) (A) unless the union has an active dispute with the manufacturer of the disfavored product, was rejected by this Court in *N.L.R.B.* v. *Washington-Oregon Shingle Weavers District Council,* 211 F. 2d 149, enforcing *Sound Shingle Co.,* 101 NLRB 1159. There, as here, the union induced its members to cease handling a product which was manu-

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[8] Cf. *N.L.R.B.* v. *Local 74, United Brotherhood of Carpenters,* 341 U.S. 707, 713: It "is enough that one of the objects of the action complained of was to force Stanley to cancel Watson's contract."

factured under conditions not favored by the union; the Board found, and this Court agreed, that such conduct was within the ban of Section 8 (b) (4) (A), even though the union did not have a specific dispute with the manufacturer of the disfavored product. For, as the Court noted (211 F. 2d at 152):

> The prohibited object of the boycott is stated by the statute to be "forcing . . . any employer or other person to cease using . . . the products of any other producer, processor or manufacturer . . ." This is a prohibited object whether the union has or has not a dispute with such "other producer, processor or manufacturer."[9]

See also, *Wadsworth Bldg. Co.*, 81 NLRB 802, 805-807, enforced, *sub. nom., N.L.R.B.* v. *United Brotherhood of Carpenters,* 184 F. 2d 60 (C.A. 10), cert. den., 341 U.S. 947; pp. 22-23, *infra.*

C. *There was inducement of a concerted refusal in the statutory sense notwithstanding the contract between Havstad and Jensen and the Union*

Respondents' principal defense is that the inducement of the employees of Havstad and Jensen to stop handling Paine doors was not violative of Section 8 (b) (4) (A) because, by virtue of the contract in effect between Havstad and Jensen and the Union, which provided that "Workmen shall not be required to handle nonunion material" (p. 5, *supra*), Havstad and Jen-

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[9] The Court did not reach the further question discussed *infra,* whether "an employer may bind himself to handle unfair goods and if he does so, [whether] a strike to enforce such an agreement [would be] a violation of Section 8 (b) (4) (A)," for it found no such agreement there (211 F. 2d at 153).

sen had acquiesced in the work stoppage. This contention, which was accepted by the dissenting Board members (R. 71-80), rests on the premise that the phrase, "concerted refusal in the course of their employment to . . . work on any goods," contained in Section 8 (b) (4) (A), means not merely a refusal to work, but a refusal which is contrary to the wishes of the employer. We shall show that the Board properly concluded that the "hot cargo" clause in the contract here did not bar an unfair labor practice finding.

The reasoning underlying the view that employees cannot be induced to engage in a "concerted refusal in the course of their employment" where their employer has acquiesced in the work stoppage may be summarized as follows: The term "strike," which is linked with "concerted refusal" in Section 8 (b) (4) (A) (p. 13, *supra*), presupposes employer resistance to the demand for which the strike is called;[10] "concerted refusal" merely serves the function of encompassing within the Section activity which is less than a full strike, but otherwise partakes of the elements of a strike. Moreover, Section 8 (b) (4) (A) only proscribes a concerted refusal when it occurs in the course of the employees' employment, and, when an employer acquiesces in his employees' failure to perform certain tasks, he has in effect taken the work out of this area. Finally, since the objective proscribed by the Section is "forcing or requiring any employer or other person" to cease handling another's products, this could result only if the employees have been asked to take action contrary to their employer's wishes or orders.

The Board, at first accepted this interpretation of

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[10] See *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 256.

the terms of Section 8 (b) (4) (A).[11] But, after further experience and study,[12] a majority of the Board concluded that, to read "concerted refusal in the course of their employment" as covering only refusals which are contrary to the employer's wishes, is not required by the structure of the Section, and does not fully effectuate its purposes. Accordingly, in the instant case, the earlier Board decisions on this question (n. 11, *supra*) were overruled, and it was held that, regardless of employer acquiescence, "any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present" (R. 62).[13]

The following considerations support, and demonstrate the propriety of this holding:

1. Section 8(b)(4)(A) was intended to protect not only the particular neutral employer whose employees are induced by the union, (i.e., Havstad and Jensen), but all other neutral employers (i.e., Sand Door, and Watson and Dreps), who, as a result of the union's

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[11] *Rabouin, d/b/a Conway's Express,* 87 NLRB 972, 982, enforced, 195 F. 2d 906, 912 (C.A. 2); *Pittsburgh Plate Glass Co.,* 105 NLRB 740, 743-744.

[12] Cf. *Packard Motor Car Co.* v. *N.L.R.B.,* 330 U.S. 485, 482-493.

[13] Two members of the Board majority (Chairman Farmer and Member Leedom), without passing upon the validity of such a clause vis-a-vis the parties thereto (R. 59), concluded that it provided no defense where the union had approached the contracting employer's employees directly and all the other elements of an 8 (b) (4) (A) violation existed. The third member of the majority (Member Rodgers) declared the contract itself to be against public policy (R. 66-68). Cf. *McAllister Transfer Inc.,* 110 NLRB 1769. The positions reflected in *Sand Door* have subsequently been affirmed in *American Iron Machine Works,* 115 NLRB No. 121, 37 LRRM 1395 (March 15, 1956).

action, are embroiled in a dispute not their own.[14] Thus, the Section proscribes "forcing or requiring . . . any employer or *other person*" to cease doing business with another; the phrase "other person" serves no purpose unless the shield of the Section extends beyond the employer of the induced employees[15] Moreover, as the Board noted, in Section 8(b)(4)(A) "Congress intended to protect the *public* from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes" (R. 60, emphasis added).[16]

To hold that union inducement of employee refusals to handle a product is not interdicted by Section 8(b)(4)(A) where their employer has acquiesced in this action, overlooks the interests of the other neutral employers and the public. In short, though Havstad and Jensen may have acquiesced in respondents' action in causing their employees to discontinue handling Paine doors, this does not lessen the resultant impact of the action on the non-consenting Sand Door and Watson and Dreps, who thereby incur a reduced market for Paine doors, and on the non-consenting members of the public, whose housing costs may thereby be increased. Hence, it can hardly be assumed that Congress intended that the acquiescence of Havstad and Jensen would obliterate the statutory protection accorded the other neutral parties in this case.

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[14] Indeed, the record shows direct negotiations between the Union and Sand Door (pp. 4-5, *supra*).

[15] As Senator Taft stated (93 Cong. Rec. 4198): "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees."

[16] See the preamble to the Act (Section 1 (b)), and the legislative history set forth in the Board opinion herein (R. 60-61, n. 21).

This conclusion is not impaired by the circumstance, relied on by the dissenting Board members (R. 74-76), that, since the inducement of "employers" is not proscribed by Section 8(b)(4)(A), had the Union achieved a cessation of work on Paine doors by appealing to Havstad and Jensen directly, rather than to their employees, there would be no violation despite a resultant injury to the interests of other neutral employers and the public. Congress, for various reasons (see *Rabouin, d/b/a Conway's Express* v. *N.L.R.B.*, 195 F. 2d 906, 911-912 (C.A. 2)), did not proscribe *every* means of enmeshing neutral employers and the public in disputes not their own. However, this clearly does not license achieving such enmeshment by a means which Congress did regard as serious enough to warrant prohibition, i.e., direct appeals to employees. It is one thing to permit an employer to remain free to decide, in the light of normal business considerations, whether he will agree to a union's boycott demands, or, having once agreed, will continue to live up to that agreement; it is quite another thing to have that decision influenced by a work stoppage of his employees, and this is the point at which Congress drew the line.[17] Thus, the facts here show that, notwithstanding the contract between Havstad and Jensen and the Union, the former had instructed its employees to handle Paine doors, and

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[17] This distinction is overlooked when it is contended (see R. 76-77) that, to preclude the union from "enforcing" the contract by direct appeals to the employees, encourages "employers to violate their lawful agreements with labor organizations." The availability to the union of the usual remedies for breach of contract still acts as an inducement to the employer to live up to his agreement with the union; the preclusion of direct employee appeals merely insures that the employer will decide whether to risk these remedies in an atmosphere free of employee pressures.

the employees actually had been handling them; this stopped only after Business Agent Fleisher arrived on the scene and ordered work on the doors to be discontinued (pp. 3-4, *supra*). See *McAllister Transfer, Inc.*, 110 NLRB 1769, 1773-1774, 1790.

2. The legislative history of Section 8(b)(4)(A) indicates that Congress intended to ban the type of activity involved here, irrespective of employer consent to the union's program. Thus, as illustrative of the kinds of cases which Section 8(b)(4)(A) was designed to prevent, Senator Taft cited (93 Cong. Rec. 4198-4199):

> the case of the New York Electrical Workers Union [Allen Bradley], which said, "We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put in any building in New York City."

the situation where:

> . . . All over the United States, teamsters are saying, "We will not handle this lumber, because it is made in a plant where a CIO union is certified" . . . .

and the situation, identical to that here, where:

> . . . all over the United States, carpenters are refusing to handle lumber which is finished in a mill in which CIO workers are employed, or, in other cases, in which American Federation of Labor workers are employed.[18]

[18] Similarly, in explaining the effect of Section 8 (b) (4) (A), which was derived from the Senate Bill, the Senate Report (No. 105, 80th Cong., 1st Sess., p. 22) states:

> [It is] an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New

In the *Allen Bradley* case, *supra,* the unions conducting the product boycott were doing so not only with the consent of their employers but also with their active cooperation (see the Supreme Court opinion in the case, 325 U. S. 797, 799-800). Moreover, at the time that Congress was considering the other situations described above, the practice of securing the employer's consent in advance to boycott a product, by means of a "hot cargo" clause in the collectvie bargaining contract, was already established.[19] This was particularly true of respondents' international, the United Brotherhood of Carpenters, which, since early in 1900, has implemented its union label policy by arrangements and agreements with the contractors and other employers of its members.[20] Accordingly, it is reasonable to assume that Congress was well aware of the factor of employer acquiescence, but nevertheless decided to ban union in-

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York City by Local No. 3 of the I.B.E.W., where electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3 (See testimony of R. S. Edwards, vol., 1, p. 176, *et seq.; Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.,* 325 U.S. 797).

See also, 93 Cong. Rec. 4863 (Senator Morse); *Hearings before the Senate Committee on Labor and Public Welfare, on S. 44 and S. J. Res. 22,* 80th Cong., 1st Sess., pp. 381-398, 1715-1729.

[19] See e.g., *American Newspaper Publishers Assoc.,* 86 NLRB 951, 970-971; *Rabouin, d/b/a Conway's Express,* 87 NLRB 972, 1020. U. S. Dept. of Labor, Bureau of Labor Statistics, *Union Agreement Provisions* (G.P.O., 1942), pp. 32, 165; The Bureau of National Affairs, *Collective Bargaining Contracts* (Washington, D.C., 1941), pp. 394-395; Loft, *The Printing Trades* (Farrar & Rinehart, 1944), pp. 219-220; N.Y. State Dept. of Labor, *Provisions of Teamsters' Union Contracts in New York City* (1949), p. 36.

[20] See Christie, *Empire in Wood, A History of the Carpenters' Union* (Cornell 1956), pp. 161-169, 312-313; *U.S.* v. *Brims,* 272 U.S. 549; *Paine Lumber Co.* v. *Neal,* 244 U.S. 459, 469-470; *Bossert* v. *Dhuy,* 221 N.Y. 342, 117 N.E. 582.

ducement of employee refusals to work on an unfavored product irrespective of that factor.

3. This conclusion is consistent with the language of Section 8 (b) (4) (A). Literally, the "concerted refusal" phrase proscribes inducing employees to refuse, while at work, to perform a task which they would have done absent the inducement. Since, as we have shown (pp. 3-4), this occurred here, "the employees did refuse in the ordinary sense of that word" (*Amalgamated Meat Cutters* v. *N. L. R. B.*, C. A. D. C., decided June 22, 1956, slip op., p. 7, 38 LRRM 2289, 2292). Section 8 (b) (4) (A) contains no express qualification for cases where the employer has agreed to the refusal, and no reason appears for supplying such qualification by implication. When, in other sections of the Act, Congress has intended to qualify an otherwise blanket prohibition, it has done so specifically.[21] Nor is the condition of employer non-consent necessarily imported into the term "concerted refusal" because it is preceded by the word "strike" and followed by the phrase "in the course of their employment", and the illegal objective is defined in terms of "forcing or requiring" (see p. 18, *supra*).

Section 501 of the Labor-Management Relations Act, 1947, Title I of which encompasses the National Labor Relations Act, as amended, defines the term "strike" to include "any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." Accordingly, partial strikes and other instances of employee "insubordination" short of a full strike would be included within the term "strike" used

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[21]See the provisos to Sections 8 (b) (4) (B), 8 (b) (4) (D), 8 (b) (1) (A), 8 (a) (3) and 8 (a) (2).

in Section 8 (b) (4) (A), and it is not necessary to view the term "concerted refusal" as merely providing for that type of conduct. Moreover, when it is remembered that Congress did not wish to interdict in Section 8 (b) (4) (A), *inter alia,* appeals to consumers (see *N. L. R. B.* v. *Service Trade Chauffeurs,* 191 F. 2d 65, 68 (C. A. 2)), there is ample reason to conclude that the phrase "in the course of their employment" was inserted solely "to distinguish between employees in their capacity as employees and employes in their capacity as consumers" (R. 61-62).[22] Finally, the illegal objective is defined as "forcing or requiring any employer or other person;" even if the employer acquiesces, his employees' refusal to handle a product, though it may not "force," "requires" similar action on his part, in the sense that it necessarily curtails the employer's continued use of the product as well.[23] Indeed, nothing "could have been more successful in 'requiring' " such action by the employer (*Amalgamated Meat Cutters* v. *N. L. R. B.,* C. A. D. C., decided June 22, 1956, slip op., p. 9, 38 LRRM 2289, 2293).

Accordingly, the Board properly rejected the respondents' contention that the possible acquiescence of Havstad and Jensen immunized the inducement of their employees to stop handling Paine doors from the ban of Section 8 (b) (4) (A).

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[22] There is no question that the men were acting in their capacity as employees when the orders to stop handling Paine doors were given. Here, unlike in *Joliet Contractors Assn.* v. *N.L.R.B.,* 202 F. 2d 606, 609 (C.A. 7), cert. den., 346 U.S. 824, they were at work for a particular employer, and were actually distributing and hanging doors when Business Agent Fleisher intervened.

[23] As shown (p. 20, *supra*) the employee refusal also has a "forcing" effect when consideration is given to its impact on the other neutral employers and on the public.

D. *The Board properly concluded that, when Steinert stopped the employees from handling the Paine doors, he was acting in his capacity as an agent of respondents*

Finally, respondents contend that Steinert's action in stopping the handling of the nonunion doors cannot be attributed to them because Steinert was acting as an agent of Havstad and Jensen. This is based on the assumption that, since, as foreman for Havstad and Jensen, Steinert was empowered to issue work instructions to the employees, he was necessarily acting in that capacity when he instructed them to discontinue work on the Paine doors. That is, it was just as though the Union had asked one of the Havstad and Jensen partners to instruct his employees to stop such work, and the partner had done so. The Board properly rejected this contention.

Thus, Steinert was a member of a constituent local of Respondent District Council, as was required of carpenter foremen under the District Council's By-Laws and Trade Rules, and was vested with the authority and responsibility of enforcing the By-Laws and Trade Rules, including the one barring members from handling nonunion materials. Indeed, Section 20 (f) of the By-Laws and Trade Rules provided that "foremen are to be held equally responsible (the same as the Steward) for the enforcement of all By-Laws and Trade Rules of the District Council. Violators of this paragraph shall be subject to a fine of $100.00 and/or expulsion." (R. 199). Accordingly, when Business Agent Fleisher ordered Steinert to stop the work on the doors because they were nonunion, it is reasonable to conclude that Fleisher was invoking Steinert's obliga-

tions under the Union's rules and made him the Union's agent for their enforcement. See *N. L. R. B.* v. *Cement Masons Local No. 555,* 225 F. 2d 168 (C. A. 9); *N. L. R. B.* v. *I. L. W. U.,* 210 F. 2d 581 (C. A. 9). "The fact that [persons] may also be agents of employers does not eliminate them from the scope of" Section 8 (b) (4) (A) (*Amalgamated Meat Cutters* v. *N. L. R. B.,* C. A. D. C., *supra,* slip op. p. 5, 38 LRRM 2289, 2291).

That Steinert was enlisted in his Union, rather than his "employer," capacity is confirmed by the fact that Fleisher went to Steinert instead of to General Superintendent Nicholson. The latter was charged with the responsibility of planning the work, and was the management official who normally dealt with Business Agent Fleisher with respect to management-union matters (R. 106, 112-113, 129-131, 132, 160). Steinert, on the other hand, merely relayed Nicholson's orders to the employees (R. 106, 132). It is significant, moreover, that Fleisher did not ask Steinert to stop work in accordance with the "hot cargo" provision of the collective bargaining contract, as would be expected if he were appealing to him as a management representative. Instead, Fleisher merely ordered Steinert to stop until it was ascertained whether the doors were union-made, and proceeded to stand by to see that this directive was carried out (*supra,* p. 4). And, when Nicholson arrived shortly thereafter, Fleisher, in the presence of Steinert and carpenter Finkelstein, told him that "he had orders from the District Council that morning to stop them from hanging the doors," and added that he "could have pulled them off yesterday but . . . waited until today." (R. 54; 116-117).

Finally, it should be noted that, in his capacity as a

foreman for Havstad and Jensen, Steinert had been ordered by Superintendent Nicholson to have the doors distributed and hung (R. 110, 162-164). Hence, when, contrary to the instructions of the superintendent, Steinert carried out the orders of Union Business Agent Fleisher, it is patent that he discarded his management responsibilities and was undertaking to act in his capacity as an agent of the Union in enforcing its Trade Rules.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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JULY, 1956.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947, including the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 141, *et seg*), are as follows:

SECTION 1. * * *

(b) * * *

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I-AMENDMENT OF NATIONAL LABOR RELATIONS ACT

* * * * *

SEC. 8.(a) It shall be an unfair labor practice for an employer—* * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:

Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h) * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms

and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or

otherwise, dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

TITLE V

SECTION 501. When used in this Act—

* * * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

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No. 15026

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL; ITS AGENT, NATHAN FLEISHER; AND LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENTS.

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No. 15026

IN THE

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National Labor Relations Board,

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vs.

Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL; Its Agent, Nathan Fleisher; and Los Angeles County District Council of Carpenters,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENTS.

This case is before the court upon the petition of the National Labor Relations Board for the enforcement of an order entered by it on August 26, 1955. The petitioner, hereinafter referred to as the Board, invokes the jurisdiction of this court under the provisions of Section 10(e) of the National Labor Relations Act, as amended. (61 Stat. 136, 29 U. S. C. A., Sec. 160(e).) The Board's order is purportedly issued under Section 10 of that Act. (61 Stat. 136, 29 U. S. C. A., Sec. 160.) The Board's decision and order upon which these proceedings are predicated is reported in 113 N. L. R. B. No. 123.

Statement of the Case.

Upon charges filed by Sand Door and Plywood Company, Los Angeles, California, a wholesale jobber of building materials, the General Counsel of the Board issued a complaint, which in substance alleged that Respondents since on or about August 17, 1954 instructed the employees of a building contractor named Havstad and Jensen to refuse to install certain doors because Respondents' rules and by-laws prohibit the installation of products not bearing the union label of the United Brotherhood of Carpenters and Joiners of America, AFL, or an affiliate thereof. [R. 1-2, 5-6.] By this conduct, it is alleged, Respondents have induced and encouraged the employees of Havstad and Jensen, in the course of their employment, to refuse to handle or work on certain doors, the object being to force Havstad and Jensen, and other employers, to cease doing business with the charging party and Paine Lumber Company of Oshkosh, Wisconsin. These acts, it is alleged, constitute unfair labor practices within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, as amended. (29 U. S. C. A., Sec. 158(b)(4)(A).) The Respondents' answer to this complaint denied the commission of the unfair labor practices alleged and affirmatively averred that the Board lacked assertable jurisdiction over the subject matter of the complaint and the persons of the Respondents.

Sand Door and Plywood Company, the charging party, hereinafter referred to as Sand, is a California corpora-

tion, and has an arrangement with Paine Lumber Company of Oshkosh, Wisconsin for the distribution in Southern California of doors obtained from Paine. There was no labor dispute between Sand and its employees, Sand's intermediary, Watson & Dreps, and their employees, or Paine and its employees. Nor does the record show that Respondents have had any relationships with any of these three concerns. [R. 168-169, 170-171.]

In 1953, Sand received from Paine materials, including doors, valued at $185,796.85, no part of which had any connection with the instant controversy. In 1954, Sand received from Paine materials, including doors, valued at $103,503.05, which were shipped by Paine to various points in the state of California, among which was an item of approximately $9,000.00 [R. 198], being doors purchased by Watson and Dreps, a partnership, who took delivery at Sand's warehouse. The record does not show what Watson and Dreps did with these doors. [R. 171-173, 174.]

Havstad and Jensen, joint venturers, in 1952 began the construction of a hospital and other buildings for the College of Medical Evangelists, in the City of Los Angeles, California. In mid-August of 1954, 398 doors were delivered to the hospital building site, but the record does not reveal how they got there or from whence they came. [R. 187-188, 193.]

Havstad and Jensen, as building contractors, were parties to a Master Labor Agreement [R. 193-195], negotiated in their behalf by the Building Contractors Asso-

ciation, and the United Brotherhood of Carpenters and Joiners of America, for its affiliated District Councils and Local Unions in Southern California [R. 195-196, 197, 201-204.] This agreement governed the wages and working conditions of the employees of Havstad and Jensen. [R. 201-204.] Among the conditions of employment created by this agreement was a provision that, *"Workmen shall not be required to handle non-union material."* [R. 203.] By the express terms of this agreement, the parties covenanted that they would take no action, by any means whatsoever, "that will prevent or impede . . . the full and complete performance of each and every term and condition hereof." [R. 203-204.]

Arnold Steinert, Havstad and Jensen's foreman, at this building site, whose duties involved the assignment and supervision of work performed by the carpenters and laborers at this location, and who was in charge of the operations in connection with James Nicholson, the general superintendent for Havstad and Jensen [R. 105-106] on August 17, 1954 carried out his usual functions. In the normal course of the work, the employees report for work at 8:00 A.M., but Steinert, as foreman, usually arrives ahead of the employees and lays out his work plans for the day and assigns the various employees to the tasks he has selected for them. After the delivery of these doors in question, Steinert instructed the laborers of Havstad and Jensen to distribute these doors to the various floors of the building, preparatory to their

being "hung" by a carpenter, by the name of Sam Agronovich. About the same time, Steinert instructed Agronovich to begin the necessary preparations.

From the beginning of work done that day (8:00 A.M.), until after 11:00 A.M., Steinert was the only official of Havstad and Jensen present at this building site and was then in sole charge of all the employees [R. 131-132]. Shortly before 11:00 A.M., of that day, Nathan Fleisher, business agent of Respondent Carpenters' Local 1976, came to the building site and met Steinert in the lobby of the building and told Steinert that the doors were non-union and that "We'd have to quit hanging the doors until it was settled." The laborers, pursuant to Steinert's previous instructions, were, at the time, moving the doors from floor to floor, and Steinert instructed them to cease the distribution. [R. 164-165.]

Steinert then went to where Sam Agronovich was working and instructed Agronovich to discontinue the preparatory work, as the doors appeared to be non-union, and assigned Agronovich to other duties. After that, Steinert went on with his work, "going around to check on the work progress of the other employees under his supervision." [R. 165-166.] Fleisher, the business agent of Respondent Carpenters' Local 1976, took no part in any of these attendant conversations or instructions by Steinert. [R. 167-168.]

Nicholson, the general superintendent, reported on the job about thirty minutes after the above occurrence, learned what had happened, and went to the job site

looking for Fleisher and found the laborers were waiting for Steinert to assign them to other duties. [R. 113-116, 136.] Nicholson then went directly to Fleisher [R. 132] and asked him why he had stopped the men from hanging the doors. [R. 133-134.] Fleisher said he had taken this action so that it could be determined whether the doors were union or non-union. Nicholson admittedly lost his temper and ordered the employees to "pick up their tools," the equivalent of discharge, but upon calmer reflection directed that Sam Agronovich be assigned to other duties. All other carpenters continued in the performance of tasks previously assigned to them by foreman Steinert. [R. 118, 135.] Neither Nicholson nor Steinert assigned or attempted to assign any of the other carpenters to the duty of hanging doors. [R. 135.]

James C. Barron, vice-president of Sand, later learned that the hanging of the doors had been stopped and telephoned to Earl Thomas, secretary of Respondent District Council, asking "what the story was regarding the hanging of the doors" and was told by Thomas that he intended to ascertain if the doors were union made, and would advise Barron of his discovery. [R. 177-178.] The following day Thomas advised Barron that the doors were not union made and informed Barron that carpenters could not hang non-union doors. Thomas attempted to persuade Barron to have his company deal in union products and sought to work out a plan whereby the doors could be installed and future installation could be made on conformance with the provisions of collective bargain-

ing agreements that prohibited employees from handling non-union materials. Barron declined to cooperate in these suggestions. [R. 178-180, 186, 191.]

Sand next filed the instant charges and the Board sought an injunction in the United States District Court for the Southern District of California, which was denied. During the hearing in that matter, the judge observed that only one person had been stopped from hanging the doors and that no other carpenters had been assigned to such tasks or requested to do so. The day following this observation, at the instance of Sand, Nicholson, Havstad and Jensen's general superintendent, and a member of the carpenters' union, and Steinert, as superintendent on the job, went to each carpenter, separately, and asked each if he "would be willing to hang the doors" and from each received a negative reply. [R. 136-150.] Havstad and Jensen did not request Local 1976 to furnish other men to hang these doors. [R. 150-153, 97.]

The Trial Examiner of the Board, who took and heard the evidence, recommended that the complaint be dismissed for the reason that the provisions of the Master Labor Agreement that "Workmen shall not be required to handle non-union materials" removed this type of duties from the course of employment, and hence there were no violations of the Act. [R. 26-28.]

ARGUMENT.

I.

The National Labor Relations Board Did Not Have Assertable Jurisdiction Over Respondents.

The National Labor Relations Board, acting under its policy making powers, in October, 1954, announced that it would assert jurisdiction only in cases which, in the future, met with certain monetary standards, would be subjected to the jurisdiction of the Board. (*Jonesboro Grain Dyeing Co.,* 110 N. L. R. B. 67.) The standards thus established for the assertation of Board jurisdiction provided that to meet these requirements an enterprise must annually receive directly in the commerce flow goods valued in excess of $500,000.00, or indirectly in the sum of $1,000,000.00, or ship annually goods valued in excess of $50,000.00 directly into interstate commerce. Other standards, not pertinent here, were also announced and established.

The evidence in this case shows that in 1953 Sand received in interstate commerce, from Paine, materials valued at $185,696.84 and from January 1, 1954 to September 8, 1954 Sand received, in commerce from the same source materials valued at $103,503.05. Of this latter amount, materials valued at $9,148.32 were procured by Sand for sale to Watson and Dreps. No other figures were offered with respect to this concern. No evidence was produced as to the size or monetary value of the construction project here involved.

It appears obvious that neither Sand nor Watson and Dreps businesses meet any of the jurisdictional standards established as above.

The Trial Examiner, upon the record, found that Havstad and Jensen were the primary employers and that the record was not sufficient to fit them into any of the established standards. He regarded and found Paine and Sand to be secondary employers and without attempting to measure either of them to the standards established, the Trial Examiner found that Respondent's activities had resulted only in a slight diminution of commerce. He, nevertheless, conjecturally projected his own created standards, and on that basis considered, "this is a sufficient predicate for the assertion of jurisdiction. . . ." [R. 21-22.]

The Board, however, disagreed with the Trial Examiner as to which constituted the "primary employer" holding, without evidentiary support, that Paine and not Havstad and Jensen was the primary "employer", without giving any reasons or pointing to any evidence to justify such conclusion. It was only by this arbitrary process that the Board could twist the factual expositions into a situation that ostensibly met its standard of a direct outflow in excess of $50,000.00. The Board, caught in the dilemma of not having evidence to support its conclusions, relies on the decision of this court in *Washington-Oregon Shingle Weavers' District Council,* 101 N. L. R. B. 1159, as enforced in 211 F. 2d 946. There the facts showed that a Canadian manufacturer of shingles shipped directly to the Sound Shingle Company, non-union materials which a strike of the latter interfered with shipments of the former. The Board states that "implicit in that finding was the further finding that the manufacturer was in the position of a primary employer." The implicitness of that finding seems to have escaped this court in its review of that case because the

court makes no mention of it or that the question was even considered by the court. In fact, there appears to have been no contest with respect to the Board's jurisdiction presented to the court in that case and hence this court's decision in that case is no authority for the propositions that Paine was the primary employer.

The Trial Examiner was correct in finding that Havstad and Jensen was the primary employer because he recognized from the evidence that there was a dispute between Respondents and Havstad and Jensen that involved a working condition prescribed by a collective bargaining contract by which Havstad and Jensen had bound themselves not to require their employees to work on non-union materials. [R. 203-204, 193-196, 197.] That, and that alone, was the genesis of this controversy and no amount of legal sophistry can make anything else of it. It was no more than an accident that Paine doors were the thing that pointed up the breach of the collective bargaining contract on the part of Havstad and Jensen when they sought to require their employees to do what they had previously legally agreed not to require. The process of collective bargaining is always designed to establish the rules under which employees accept employment and the employer to obtain the benefits of that employment. The requirement, freely accepted by Havstad and Jensen, that their employees were not to be required to work on non-union materials is as much a condition of work as wages, hours or other conditions of employment. Not only did Havstad and Jensen bind itself by this requirement to remove from the working conditions the necessity of employees working on non-union goods, they further agreed, to insure faithful performance of this contractual provision, that they were under no disability of any kind whether arising out of

the provisions of Articles of Incorporation, Constitution, By-laws, or otherwise, that would prevent them from fully and completely carrying out and performing each and all of the terms of the agreement, and further, that they would not by contract or by any means whatsoever take any action that would prevent or impede them in the full and complete performance of each and every term and condition of the collective bargaining agreement. [R. 203-204.]

Thus, when Respondents protested the violation of the bargaining compact, they were in direct dispute with Havstad and Jensen. The involvement of Paine was sheer mishap. Under this record we respectfully submit that the Trial Examiner's conclusion that Havstad and Jensen were the primary employers is cogently sustained by the record and that the Board erred in finding to the contrary.

The resolution of the question as to the primary employer is indispensable in the application of the mechanical and arbitrary rules of the Board with respect to the assertion of its jurisdiction. In *Jamestown Builders Exchange,* 93 N. L. R. B. 481, the Board promulgated a special rule to test the application of its jurisdiction in the so-called secondary boycott cases. That rule stated, in substance, that the Board would consider not only the operations of the primary employer but also the operations of the secondary employer to the extent the latter is affected by the conduct involved.

Unquestionably and admittedly, respondents had a bona-fide dispute with Havstad and Jensen as to the application of the collective bargain which removed from the working conditions any requirement to work on non-union materials. The Trial Examiner so found, upon the

evidence. We submit that upon this record he could have reached no other proper conclusion.

This being so, the application of the rule laid down in *Jamestown Builders* case clearly shows that it was improper, under the established Board standards, to assert jurisdiction here, for there was no evidence that Havstad and Jensen, Sand, or Watson and Dreps satisfied these standards. The extent to which Paine was affected was the sum of $9,148.32, and likewise, none of the standards are met. Applied in its proper perspective, *Jamestown Builders* reveals a case over which the Board, by judicial decision, has stated that it would not assert its jurisdiction. While there was evidence by which other jurisdictional standards could have been viewed, the Board in its decision did not consider them. [R. 52, footnote 9.]

Assuming, without conceding, that Paine was the primary employer, the assertion of jurisdiction is improper on yet another ground.

In a line of cases, generally referred to as the *Brooks* line cases (*Brooks Wood Products,* 107 N. L. R. B. 237; *C. P. Evans Food Stores, Inc.,* 108 N. L. R. B. 1651; *McDonald McLaughlin & Deane,* 110 N. L. R. B. 1340) the Board consistently has declined to exercise its jurisdiction where the seat of the controversy is twice removed from the commerce flow.

The majority of the Board, in neither its Decision and Order nor its brief before this court, denies the effect of these decisions and makes no attempt to distinguish them or to overrule their jurisdictional effects. Obviously, the rulings in these cases point upon the unassertability of jurisdiction here because in the instant matter Paine ships to Sand. Sand delivers to Watson and

Dreps and Watson and Dreps delivers to Havstad and Jensen. Identically with the *Brooks* case, the effect of the dispute with Havstad and Jensen is twice removed from the commerce flow, and under those cases and, to quote the Board, *"As the respondents' business is not once, but twice removed from interstate commerce the volume of their business is immaterial. . . . We believe that there is insufficient impact upon interstate commerce to warrant our exercise of jurisdiction here."* Dissenting members Peterson and Murdock adopt the view that jurisdiction should not have been asserted because the relationship of the ultimate purchaser, Havstad and Jensen, was so remote that it would not effectuate the purposes of the act to assert jurisdiction here.

There is yet a final reason why the exercise of jurisdiction in this case cannot be sustained. As we have pointed out, in the Brooks cases, the respondents, who in those cases were employers charged with violations of the act, being twice removed from the commerce flow were, upon jurisdictional grounds, free of those charges. While in the instant controversy, the respondents are labor unions with a dispute twice removed from the commerce flow, the Board asserts jurisdiction. As member Murdock points out in his dissenting opinion, this establishes a double standard: One, *when the respondent is an employer,* and one, *where a labor union is respondent.* Such arbitrary determination of the exercise of Board jurisdiction is discriminatory and does not afford to labor unions the equal protection and application of the law. There appears to be no justifiable reason why an employer twice removed from the commerce flow is discharged while a labor union occupying an identical position is prosecuted. We strongly urge that this discriminatory application of Board jurisdiction is neither supported

by the act or any congressional history. In short, it is an arbitrary and unreasonable exercise of power unfounded in law and cannot be condoned by this court.

Under the circumstances of this case, the Board was not warranted in the assertion of jurisdiction. (*NLRB v. Guy F. Atkinson Co.,* 195 F. 2d 141 (C. A. 9).)

II.

On the Record Considered as a Whole There Has Been No Violation of Section 8(b)(4)(A).

The essential elements of the proscription embodied in Section 8(b)(4)(A) are, (1) that a labor organization in the furtherance of a dispute with an employer, commonly referred to as the primary employer, (2) induced or encouraged *employees* of a "neutral" employer, (3) in the course of their employment, (4) to engage in a strike or concerted refusal to perform services for the "neutral" employer, and (5) where an object thereof is to cause one employer to cease doing business with another employer. (*Rice Milling Company v. NLRB,* 341 U. S. 665.) The objective of the union, while material, is alone not sufficient; it only becomes a violation when achieved in the manner specified in the statute. (*Rice Milling Company v. NLRB, supra; Joliet Contractors Ass'n v. NLRB,* 202 F. 2d 606, cert. den., 346 U. S. 824.)

A. There Was No Strike Within the Meaning of the Statute.

Section 501 of the Labor Management Relations Act (61 Stat. 136) defines a strike as a concerted stoppage of work by *employees* . . . and any concerted slowdown or other concerted interruption of operations by

employees. The broadest definition of a strike includes "quitting work" or "a stoppage of work." (*Glaziers' Union Local 27,* 99 N. L. R. B. 1391, 1392.) Here, the evidence shows that no employees "quit", but, on the contrary, there is ample evidence that none of the *"employees"* terminated or ceased their employment. Rather, the evidence is undisputed that, with a single exception, the employees continued to perform their assigned functions without interruption. A management representative instructed certain laborers to cease distributing the doors, which instruction was obeyed. If this idleness can be termed a work stoppage, it is clear that the cessation did not originate with the employees but was a direct result of managerial orders, as we will hereafter show.

B. Steinert Acted Solely as a Representative of Management When He Instructed Employees to Cease Their Work on the Doors.

The unique approach of certain members of the Board in concluding that there was a violation of the act, requires an examination of the evidence from which the Board concluded that Arnold Steinert, the foreman for Havstad and Jensen, was an agent of Respondents. The importance of this finding is apparent from the admission of the Board that it is proper for a labor organization to exert pressure against an employer to accomplish a boycott and in the further view that the Board has held that the collective bargaining contract, with its restrictive clause, that "workmen shall not be required to handle non-union material", is not *per se* violative of the act. Consonant with the position of the Board is the conclusion that had Fleisher's appeal to Steinert been an appeal to management no violation would have been found. In order for the Board to make this uniquely strained con-

struction stand up it was necessary for the Board to infer that Steinert was an agent of respondents and not a managerial actor. It is well settled that such an inference must be based upon the preponderant facts and that such a mere inference standing alone is without substance.

The Board relies solely upon the evidence which is found in the by-laws and trade rules of Respondent Council wherein it is stated that "foremen are to be held equally responsible . . . for the enforcement of all by-laws and trade rules of the District Council." The Board, in its brief, says that from this, "it is reasonable to conclude that Fleisher was invoking Steinert's obligation under the Union's rules and made him the union's agent for their enforcement." But the fallacy of this conclusion is that it is based upon nothing in the record which points to the rule as being the motivating factor which prompted Steinert's conduct. In a similar case and under like conditions, the Seventh Circuit, in *Joliet Contractors Ass'n v. NLRB,* 202 F. 2d 606, and the Board, in *Glaziers Union Local 27,* 99 N. L. R. B. 1391, both held that by-laws standing alone do not prove a motivating factor sufficient to sustain an agency theory. The Seventh Circuit pointed out that something more than the mere existence of by-law provisions were necessary; that there must be probative evidence that the actor was in fact following the dictates of such rules. There is, of course, no evidence that the by-laws and rules had anything to do with the action taken by Steinert. The Board seizes this rule as pointing up the culpability of Steinert and totally ignores the provision of the collective bargaining contract which expressly provides, *"that any provision in the working rules of the Unions, with reference to the relations between the Contractors and their employees, in conflict with the terms of this Agreement shall*

be deemed to be waived and any such rules or regulations which may hereafter be adopted by the Unions shall have no application to the work hereunder." [R. 204.]

Thus, the provision of the rules are not to reach the end which the Board decides, but it is the provisions of the contract that govern, not the working rules. With this waiver of the rules, established by written contract, Fleisher's appeal to Steinert could only have been based upon the collective bargaining restriction against employees handling non-union materials.

There is no dispute but that Steinert was a foreman in the commonly accepted sense, and that within the meaning of the Act he was a supervisor and not an employee covered by the provisions of the statute. (Sec. 2(3) and 2(11), 106, 123, 131-132, 139-140, 135, 162-164, 166.) Steinert was subordinate to James Nicholson, the general superintendent, and in Nicholson's absence Steinert was in full charge of the job. Steinert's normal functions consisted of laying out work plans for the day, assigning various employees to the work tasks and making periodic checks of the work progress by going to the various locations of employees, observing their work and progress and generally seeing that all employees were efficiently performing their assigned tasks. This Steinert did on August 17.

When Fleisher came to the building site on this date, the only representative of management present was Steinert. *Nicholson was absent.* There was no other representative of management present for Fleisher to appeal to. In the words of general superintendent Nicholson, Steinert was in complete charge of all operations. [R. 131-132, 137-138, 143.] Fleisher said nothing about the by-laws or trade rules; in fact, there appears that there

never was any conversation by anybody about the trade rules. Obviously, Fleisher's appeal was to management.

As further evidence that Steinert was not acting as an agent of Respondents or motivated by the trade rules was the first official action taken, and that was to stop the *laborers* from distributing the doors. Admittedly, Fleisher did not represent, nor was he speaking for the laborers. *The laborers are not covered by the trade rules of Respondent Council,* nor are they members of any labor union subject to those rules. [R. 158, 165.] The next official act taken by Steinert was to direct a carpenter to cease handling the doors. This was the same carpenter that Steinert had previously assigned to the task of making the preliminary arrangements to "hang" the doors. Thus we have a startling inconsistency. When Steinert assigned the carpenter to this task, Steinert was acting for management, but when Steinert directed the employee to cease that assignment and begin another one Steinert becomes an agent of Respondents.

It is uncontroverted in this record that Steinert was the authorized agent of Havstad and Jensen, to whom the employees looked to for instructions in the performance of their work and the assignment of their job tasks; it is abundantly clear that had the employees refused to follow the instruction of Steinert they would have been guilty of insubordination.

We submit that for the Board to ignore the proven managerial status of Steinert, in view of the undisputed evidence, and to find that he represented Respondents and thus induced a strike of employees he supervised is an unwarranted and unreasonable conclusion, and not supported by the substantial evidence on the record considered as a whole.

This being true, Respondents are not responsible for the acts of Steinert, and under the majority's admitted position, as expressed in its decision, there has been no inducement of employees by Respondent, an indispensable element of a violation of 8(b)(4) of the Act.

C. The Conduct of Respondents Does Not Amount to a Violation of Section 8(b)(4)(A).

Sometime in the morning of August 17, 1954, some doors were delivered to the above mentioned hospital site.

About 11:00 A.M. of that date Respondent Nathan Fleisher discovered the doors and observed that they did not appear to have a union label on them. Fleisher sought out Arnold Steinert, the job foreman, and the only representative of management present on the job, and told Steinert that the doors appeared to be non-union and that installation of the doors would have to be stopped pending an investigation to be conducted to determine whether the doors were union material. We have, we believe, conclusively shown that Steinert was a supervisor within the meaning of the Act, and also under the Act was an "employer" within the definition set forth in the statute of that term. We have also shown by the undisputed evidence that Steinert, in the absence of Nicholson, was in complete charge of the Havstad and Jensen employees.

Upon receiving this advice from Fleisher, Steinert, in his managerial capacity, and upon his own initiative, took two separate actions. First, he instructed the laborers to discontinue the doors distribution, and secondly he went to the only employee engaged in the door hanging process and instructed this employee to engage in other duties. Fleisher made no statements to the employees and did not participate in the issuance of Steinert's instructions to the

employees. It is also definitely established by the record that all carpenters, except the one engaged in the preparatory door hanging work, did not stop their work in any degree.

Havstad and Jensen were parties to and bound by a collective bargaining agreement whereby they had previously agreed not to require "workmen to handle non-union materials." Had Steinert not taken the action he did, but had insisted and instructed the employees to work on these admittedly non-union materials, he would have caused Havstad and Jensen to have breached their collective bargaining agreement. In giving this information to Steinert, Fleisher was merely carrying out his duty of seeing that the provisions of the collective bargaining agreement were obeyed by Havstad and Jensen management. It is significant that Fleisher did not, at any time, direct any of his remarks to any employees, but only to representatives of management. This episode, in the perspective of this record, cannot be held to amount to a concerted refusal to perform services. Employees cannot refuse to do that which they are instructed not to do by the properly constituted authority of management.

The Trial Examiner refused to find that Steinert was acting as a representative of Respondent Council. The Board disagrees principally, as it states in its decision, because ". . . there is in addition, no indication of the extent of Steinert's authority to act for his employer", a conclusion patently not supported by the record. Nicholson, the general superintendent, of Havstad and Jensen, testified without contradiction that in his absence Steinert was in charge. In the scene of these activities it appears without dispute that Nicholson was not present nor was he at the building site when Fleisher gave his information

to Steinert. By Nicholson's own words, Steinert was in charge and being in charge he was most certainly performing managerial functions. [R. 131, 143.]

1. The Collective Bargaining Agreement as a Defense to the Charges Alleged and Found.

Prior to the decision in this case the Board had uniformly held that where an employer had bound himself by the collective bargaining process not to require his employees to work on non-union materials the execution of such a provision did not amount to a violation of the secondary boycott proscription of the statute. In this the Board was strongly supported by the decision of the Second Circuit in *Conway Express v. NLRB,* 195 F. 2d 906, 912. In that case a collective contract had, in like manner, removed from the employment area any requirement to work on non-union goods. Charged by Conway of 8(b)(4)(A) violations (on which the Board had ruled against Conway), that court said:

> "The Union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle (Conways) shipments under the terms of the area agreement provision relating to cargo shipped by struck employees. Consent in advance to honor a hot cargo clause is not the product of the unions' 'forcing or requiring any employer . . . to cease doing business with any other person.'
>
> "Of course, the direct strike against petitioner himself is not a secondary boycott. The distinction between the primary and secondary employer for the purpose of the section is now well recognized."

This court, in the *Sound Shingle* case, *supra,* assumed the decision of the Second Circuit to be a proper statement

of the law with respect to the hot cargo phase, but did not apply it because the court found there was no agreement in the *Sound Shingle* case which had a provision removing hot cargo from the employment area. However, this court said that the Board had long recognized that where there were agreements, such as present here, "it would be a waiver of the employer's statutory protection against secondary boycotts", which the court thought was the correct principle of law to be applied.

Here two members of the Board seek to overrule the Second Circuit and the decision of this court. The four members hold that where an employer, at the request of a union agrees to boycott the goods of another employer there is no violation of Section 8(b)(4)(A) because there has been neither a strike nor inducement or encouragement of employees to engage in such conduct. Say these four members, "what an employer may be induced to agree to do at the time the boycott is requested, he may be induced to agree in advance to do by executing a contract containing a 'hot cargo' clause". The fifth member would hold such clause void. But at this point the members part company. Two members say that while such a contract is not against public policy and otherwise valid, the union may not approach the employees of the contracting employer and in accordance with the contract provisions induce those employees to observe the hot cargo provisions without engaging in a violation of the section of the statute here considered. Two other members hold that such a construction is destructive of the collective bargaining benefits and that it does not amount to a violation when the union agents inform the employees, for whose benefit the collective pact is executed, of the hot cargo provisions or attempts to have such employees abide by the rule thus established. The fifth member, Mr. Rogers,

emphatically refused to adopt the reasoning or conclusions of the other four, holding that such clauses are void as against public policy. Only because of his belief that such clauses are void did Mr. Rogers join the two members who held the union incapable of enforcing the contract through employee participation. He expressly rejected their reasoning.

We come then, abruptly, to the question of whether there is in fact a valid Board order, capable of enforcement, on this all important phase of the case. Two members holding the union incapable of enforcing the hot cargo provisions without involving a violation of 8(b)(4)(A), two holding diametrically to the contrary, and the fifth refusing to adopt the position of any of the other four. It would seem that under the well known rule of judicial decision, where a majority of a court or Board does not agree upon the disposition of a case or the important portion of it, there is no decision and hence no valid order is before the court for its consideration.

We submit that the dissenting opinion of member Murdock is the only logical and proper decision that can be reached in this case and we adopt by reference all of the arguments against the validity of the order which he presents.

We agree that it is illogical to conclude, as two members of the Board do, that it is legal and proper to adopt a hot cargo provision in a collective bargaining contract but that a union, party to such agreement, is barred by the statute from acquainting the employees benefited by the collective contract of the provision and requesting or commanding that such employees obey those provisions. The members who so held do not quarrel with the propriety of the union exerting pressure against the contracting em-

ployer to reach the same results. That, they say is permissible. But if the union tells its members about the provision and that results in the provisions of the contract being carried out, then the union has contravened the statute. This conclusion has been rejected by the United States Supreme Court. (See *Assoc. of Westinghouse Employees v. Westinghouse Corp.,* 348 U. S. 437.)

It is unquestionably the employees for whom the contract is reached. In the collective action which culminates into a contract under which the employee accepts employment and the terms by which the employer agrees to employ, where that collective contract speaks of the relationship, employer and employee are contractually defined. We urge that there is no difference in entering into an agreement that employees will not be required to work on non-union goods than there is that the employees will not be required to work under unsafe conditions, or that the employees will not be permitted to use certain types or makes of tools, either for reasons of safety or productivity. Such restrictive provisions are common in labor contracts. These provisions can and do result in "boycotting" the makers of those tools and cause the employer to refrain from dealing with those makers. Yet, it is not contended, and we doubt it will be, that such restrictive covenants amount to a secondary boycott. The point is that all of these are conditions of work. All of these matters are reasonably necessary for the peaceful relations of the employer and his employees and the enhancement of the productive effort. There is no difference between a requirement that the employer will not require productive efforts on non-union materials than that the employer will be required to pay wages or confer other working benefits to his employees. We suggest there is nothing improper in the insistence by a union that a contracting employer

obey the restrictions concerning the types and makes of tools, although that may, and has, resulted in not using those articles, or that the employer pay wages or perform other provisions of the collective action even though it may result in some supplier being unable to inject his offensive articles into the employment relation. Neither is there an impropriety in a union insisting in the obedience of any of the provisions of its collective contract.

The correctness of these conclusions is emphasized by still another provision of the collective contract. As we have previously stated, the employer has agreed that he would not, by contract or otherwise, put himself in a position where he violates any of the terms of the collective bargain. Havstad and Jensen, by this provision, *had a duty to determine prior to the delivery of the doors that such were union made,* or at least the doors and *the contract which they executed for obtaining the doors was in conformity to the promises and agreement of Havstad and Jensen not to take any action which would put them in a position to violate the contract's provisions.* To hold that a union, charged with the representation of employees, could not compel the contracting employer to obey his contract is foreign to any legal concept.

The plain fact is that a union would have been derelict in its duty to the persons it represents not to have completely informed its membership as to every clause in its collective agreement.

When Fleisher appealed to Steinert to stop the hanging of the doors, he was, manifestly, appealing to management to obey the contractual provisions. The fact that the working rules of Respondent Council and the restrictive provision of the contract were almost identical in terms with respect to work on non-union goods does not alter the proper conclusion that the union was not acting contrary

to the statute when Fleisher made his appeal to Steinert. The Board argues that Fleisher did not mention the contract provisions when he spoke to Steinert and that appears to be a fact. But the fact is also clear that he did not mention the working rules either. Persuasive authority has held that working rules standing alone do not amount to statutory violations. (*Joliet Contractors Ass'n v. NLRB, supra.*) That court held that the rule *may* furnish the inducement or encouragement for a strike or concerted refusal to perform services, but at least, until they have been shown by evidence to have done so, they are not contaminated with illegality. In this case, there is no evidence that the working rules were the motivating factor which resulted in the difficulty concerning the doors. A contrary conclusion without evidentiary support is a nullity.

We suggest the impropriety and illegality of Paine and Sand seeking to inject their product into an area which has contractually been foreclosed to them. We believe that for them to do so would be soliciting the breach of contract by Havstad and Jensen, a solicitation we believe to be contrary to law. We are not unmindful that in the struggle for existence, competition for markets becomes keen. We do know, however, of no rule which permits such competition to succeed by the inducement of violations of contracts of others in the competitive market. We suggest that the injection of Paine and Sand into a market for which they are not qualified is not afforded protection by the provisions of this statute. As mere interlopers they must accept the market as they find it and cannot complain because it has previously been contractually denied. Having engaged in illegal conduct, we believe it highly improper to grant them asylum under the secondary boycott provisions of the Act. This is es-

pecially true here where Havstad and Jensen have not only agreed not to require their employees to work on non-union materials, but where they have further agreed that they will not "by contract, or any means whatsoever, take any action that will prevent or impede (them) in the full and complete performance of each and every term and condition" of the collective bargaining contract.

The Board argues, with some petulance, that 8(b)(4) was intended to protect neutral employers because they are embroiled in a dispute not their own. But, manifestly, when an employer or person seeks to inject their offensive products into a market which has contractually been foreclosed to them, they cease to be neutral employers or persons and become not only directly involved, but are the prime motivation of the industrial dispute. By their actions, they seek and intend to promote breaches of collective compacts and to disrupt the tranquillity of previously stabilized industrial relations.

In dealing with the subject of 8(b)(4), this court, in the *Sound Shingle* case, quoted from the statements of Senator Taft, 93 Cong. Rec. 4198, in 2 Leg. Hist. L. M. R. A. 1107. A part of that quotation reads, *"If their conditions are not satisfactory,* then it is *perfectly lawful to encourage them to strike."* What could be more unsatisfactory conditions than where an employer and a union have agreed by contract not to require the workmen covered to handle non-union materials and then have that employer induced, by a party foreign to the contract, to breach his agreement and to require his employees to handle non-union materials. In other words, Havstad and Jensen agreed to remove from the conditions of work any requirement that their employees handle non-union materials. This was a working condition. In violation of the express provisions of their contract they unilaterally

sought to require the handling of non-union materials. Most certainly this sets up a situation visualized by Senator Taft, and one which the Senator stated that *"it is perfectly lawful to encourage them to strike."* This argument becomes more compelling when it is considered that Sand and Paine, through Sand, attempted to disrupt the peaceful relations between Havstad and Jensen by the injection of their non-union materials. It is most difficult to conceive that in taking this action Sand and Paine could remain aloof from the inevitable results of their generating a labor dispute and still be termed neutrals. Human conception is not so culpable.

The Board concedes that section 8(b)(4)(A) only proscribes a concerted refusal when it occurs in the course of the employees' employment, and, when an employer acquiesces in his employees' failure to perform certain tasks, he has ,in effect, taken the work out of this area. (Bd. Br. p. 18.) Havstad and Jensen not only by contract removed the handling of non-union materials from the work requirements, they expressly acquiesced in the cessation of the hanging of the doors. Under the Board's own interpretation, the proscription of the Act does not reach the conduct concerning which the Board complains.

Conclusion.

For the reasons set forth herein, it follows that the Board's petition for enforcement of its order should be denied and the court should set aside in full such order and decision.

Respectfully submitted,

ARTHUR GARRETT and
JAMES M. NICOSON,
Attorneys for Respondents.

No. 15027

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HERALD PUBLISHING COMPANY OF BELL-FLOWER,
Respondent,

and

HERALD PUBLISHING COMPANY OF BELL-FLOWER,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-15-56

No. 15027

United States
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NATIONAL LABOR RELATIONS BOARD,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board,
Washington, D. C.,
For Petitioner, National Labor Relations Board.

MESSRS. LELAND & PLATTNER, by
PETER M. WINKELMAN,
3450 Wilshire Bldg.,
Los Angeles, California,
For Respondent, Herald Publishing Co. of Bellflower.

Form NLRB-501

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-2044.

Date Filed: 7/21/54.

Compliance Status Checked by: H.F.D.

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought

Name of Employer:
Herald Publishing Company.

Address of Establishment:
218 East Magnolia Street, Compton, California.

Number of Workers Employed:
Approximately 160.

Nature of Employer's Business:
Newspaper Publishing.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

On or about July 17, 1954, the employer discharged Sol London, and has refused to reinstate said London because of London's membership and activities on behalf of American Newspaper Guild, C.I.O.

At various times since on or about April 1, 1954, the employer has interrogated employees as to their union membership and activities; has warned employees not to join the American Newspaper Guild, C.I.O., and has threatened employees with dismissal if they became or remained members of the American Newspaper Guild, C.I.O.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

American Newspaper Guild, C.I.O.

4. Address:

1010 South Broadway, Los Angeles, California.

Telephone No.: PRospect 0241.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit:

Congress of Industrial Organizations.

6. Street and number, city, zone, and State:

Please send copies of all documents and correspondence to Wirin, Rissman & Okrand, 257 South Spring Street, Los Angeles, California.

Telephone No.: Michigan 9708.

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: July 19, 1954.

By /s/ ROBERT R. RISSMAN,
Attorney.

Wilfully False Statements on This Charge Can Be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80).

Admitted in evidence as General Counsels' Exhibit 1-A, December 6, 1954.

Form NLRB-501

United States of America
National Labor Relations Board

FIRST AMENDED CHARGE AGAINST EMPLOYER

Case No.: 21-CA-2044.

Date Filed: 8-19-54.

Compliance Status Checked by:

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought

Name of Employer:

Herald Publishing Company.

Address of Establishment:

218 East Magnolia Street, Compton, California.

Number of Workers Employed:

Approximately 160.

Type of Establishment:

Newspaper Publishing.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

On or about July 17, 1954, the Employer discharged Sol London and has refused to reinstate said London because of London's membership and activities on behalf of American Newspaper Guild, CIO.

On or about August 17, 1954, the Employer acting through its agents, representatives and supervisors discharged Ray Ross because of his activities on behalf of and membership in the American Newspaper Guild, CIO.

On or about August 18, 1954, the Employer acting through its agents, representatives and supervisors discharged Gloria Hickey and Doris Farley because of their activities on

behalf and membership in the American Newspaper Guild, CIO.

At various times since on or about April 1, 1954, the Employer has interrogated employees as to their union membership and activities; has warned employees not to join the American Newspaper Guild, CIO, and has threatened employees with dismissal if they became or remained members of the American Newspaper Guild, CIO.

The Employer has by its agents, representatives and supervisors engaged in surveillance of union meetings in violation of Section 8 (a) (1) of the Act at various times since April 1, 1954.

By the above and other acts the Employer has interfered with, restrained and coerced employees in their rights guaranteed in Section 7 of the Act, or in violation of Section 8 (a) (1) and Section 8 (a) (3) of the Act.

3. Full Name of Party Filing Charge:
   American Newspaper Guild, CIO.

4. Address:
   1010 South Broadway, Los Angeles, California.
   Telephone No.: PR. 0241.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit:
   Congress of Industrial Organizations.

6. Street and number, city, zone, and State:

Please send copies of all documents and correspondence to Wirin, Rissman & Okrand, 257 South Spring Street, Los Angeles, California.

Telephone No.: MI. 9708.

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: August 19, 1954.

By /s/ JOSEPH L. CAMPO,

JOSEPH L. CAMPO,
International Representative.

Wilfully False Statements on This Charge Can Be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80).

Admitted in evidence as General Counsel's Exhibit 1-C, December 6, 1954.

United States of America, Before the National Labor Relations Board, Twenty-first Region
Case No. 21-CA-2044

HERALD PUBLISHING COMPANY,

and

AMERICAN NEWSPAPER GUILD, CIO.

COMPLAINT

It having been charged by American Newspaper Guild, CIO, that Herald Publishing Company has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act; and the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-first Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

1. Herald Publishing Company, a California corporation, herein called the Respondent, prints and publishes seven or more community newspapers in Los Angeles County, California. The Respondent's gross annual income from these newspapers is in excess of $500,000.

2. The Respondent is, and at all times material herein, has been, engaged in commerce within the meaning of the Act.

3. American Newspaper Guild, CIO, herein called the Union, is a labor organization within the meaning of the Act.

4. The Respondent, by and through its officers, agents and employees, did discharge the following employees on the dates mentioned and failed to re-employ them for the reason that they and each of them engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection as defined in Section 7 of the Act: Sol London on July 17, 1954; Raymond J. Ross on August 17, 1954; and Gloria Hickey and Doris Farley on August 18, 1954.

5. The Respondent, by its officers, agents and employees, while engaged in its business described in paragraphs 1 and 2 above, beginning on or about July 1, 1954, and thereafter up to and including the date of the issuance of this Complaint, has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, by various acts and statements as follows:

(a) By threats by Jack Cleland, City Editor of the Compton-Lynwood editions of the Respondent's newspaper and a supervisory employee, early in July, 1954, that employees who join the Guild would not be working for the Herald American.

(b) By questioning employees as to union affiliation by Classified Advertising Manager Leonard Lugoff, a supervisory employee, during the early part of July, 1954, and by his threat that anyone who joins the Union would be immediately dismissed.

(c) By Lugoff's statement to employees during the early part of July, 1954, that the Respondent's Publisher, Colonel C. S. Smith, had instructed him to discharge the entire department if he could not determine who was responsible for the organizing drive.

(d) By questioning by Butler, on or about July 12, 1954, of employees as to whether they had joined the Union.

(e) By the statement by Managing Editor Butler, a supervisory employee, on or about July 17, 1954, that London had been discharged for attempting to organize for the Guild, and by a statement to the same effect by Cleland on or about August 14, 1954.

(f) By attempted surveillance by Louis Murray, a supervisory employee, of what he believed to be a union meeting, on or about July 17, 1954.

(g) By the granting of wage increases to several employees as a means of combating unionization on or about July 17, 1954, and thereafter.

6. The activities of the Respondent set forth in paragraphs 4 and 5 above, occurring in connection with the operations of the Respondent described in

paragraphs 1 and 2 above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce as defined in Section 2, subsection (7) of the Act.

7. The foregoing acts of the Respondent, as set forth in paragraph 4 above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a), subsection (3), of the Act, and Section 2, subsections (6) and (7) of the Act.

8. The aforesaid acts of the Respondent, as set forth in paragraphs 4 and 5 above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a), subsection (1), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-first Region, on this 14th day of October, 1954, issues this Complaint against Herald Publishing Company, Respondent herein.

[Seal] /s/ GEO. A. YAGER,
Acting Regional Director, National Labor Relations Board, Twenty-first Region.

Admitted in evidence as General Counsel's Exhibit 1-E, December 6, 1954.

Before the National Labor Relations Board

[Title of Cause.]

AMENDMENT TO COMPLAINT

Comes now the General Counsel, by the Acting Regional Director for the Twenty-first Region, and amends the Complaint heretofore issued in this proceeding as follows:

In the paragraph numbered "1" the following sentence should be added immediately after the matter appearing therein:

> "The Respondent also subscribes to and uses the services of United Press, which is an interstate news service; and publishes various nationally syndicated newspaper features including, without limitation, features copyrighted by The Bell Syndicate, Ltd., Field Enterprises, Inc., and McNaught Syndicate, Inc.; and advertises nationally sold products."

Dated at Los Angeles, California, this 10th day of November, 1954.

[Seal] /s/ GEO. A. YEAGER,

Acting Regional Director, National Labor Relations Board, Twenty-first Region.

Admitted in evidence as General Counsel's Exhibit 1-H, December 6, 1955.

[Letterhead]
Herald American
General Offices
218 E. Magnolia St.—Compton, California

November 19, 1954.

National Labor Relations Board,
Room 704,
111 W. 7th St.,
Los Angeles, Calif.

United States of America, Before the
National Labor Relations Board, 21st Region
Case #21-CA-2004

Herald-American and Newspaper Guild, CIO.

ANSWER TO COMPLAINT

After reading this complaint and the amendment to the complaint served upon this company, the complaint itself is so full of misleading statements, incorrect statements innuendo and deliberate untruths that this company finds it necessary to merely answer that any charges of violation of the National Labor Relations Act imputed to this company are totally incorrect, false and untrue to the best of our knowledge and belief.

/s/ C. S. SMITH,
Publisher, Herald
Publishing Company.

Subscribed and sworn to before me this 19th day of November, 1954.

[Seal] /s/ GEORGIA D. VERNON,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 5, 1955.

[Stamped]: Received Nov. 22, 1954; N.L.R.B.

Admitted in evidence as General Counsel's Exhibit 1-J, December 6, 1954.

Before the National Labor Relations Board

HERALD PUBLISHING COMPANY,
and
AMERICAN NEWSPAPER GUILD, CIO.

AMENDED ANSWER TO COMPLAINT AND AMENDMENT TO COMPLAINT

Comes now Herald Publishing Company and in answer to the complaint and amended complaint on file herein, admits, denies and alleges as follows:

I.

Answering paragraph "1" of said complaint, this defendant denies that the Herald Publishing Company, a California corporation, herein called the Respondent, prints and publishes seven or more community newspapers in Los Angeles County,

California, but in that connection states that the Herald Publishing Company of Bellflower, a California corporation, prints and publishes seven or more community newspapers in Los Angeles County, California.

Further answering said paragraph, this defendant admits that the gross annual income from the newspapers published is in excess of $500,000.00, but denies generally and specifically each of the allegations contained in said paragraph, particularly the amendment to this paragraph, and in connection therewith and by way of explanation of its general denial, states as follows:

(a) That said Herald Publishing Company of Bellflower pays the United Press $5.00 per week for a retainer service and weekly letter on local affairs, but does not subscribe to or use the services within the contemplation of the meaning of the Act.

(b) Herald Publishing Company of Bellflower does not publish various nationally syndicated newspaper features within the meaning of the Act but only uses the two-column panel cartoon with no continuity or regularity for filler material only.

(c) The advertising of national products is less than one-half of one per cent of the total advertising sales (except for local merchants advertising products sold locally).

II.

Answering paragraph "2" of said complaint, this

defendant denies generally and specifically each and every allegation therein contained, and the whole thereof.

III.

Answering paragraph "4" of said complaint, this defendant denies each and every allegation therein contained, and in connection with the allegations set forth in said paragraph, states that Sol London was discharged for unsatisfactory services, and that Gloria Hickey, Doris Farley and Raymond J. Ross were discharged solely for economy reasons.

IV.

Answering paragraph "5" of said complaint, this defendant denies each and every allegation therein contained, and particularly answering subdivision "(a)" thereof denies that Jack Cleland made some or any similar statements set forth in said subdivision; as to subdivision "(b)" thereof denies each and every allegation therein contained; as to subdivision "(c)" thereof denies each and every allegation therein contained; as to subdivision "(d)" thereof denies each and every allegation therein contained; as to subdivision "(e)" thereof denies each and every allegation therein contained; as to subdivision "(f)" thereof denies each and every allegation therein contained; as to subdivision "(g)" thereof denies each and every allegation therein contained.

V.

Answering paragraph "6" of said complaint, this defendant denies generally and specifically each and every allegation therein contained, and the whole thereof.

VI.

Answering paragraph "7" of said complaint, this defendant denies generally and specifically each and every allegation therein contained, and the whole thereof.

VII.

Answering paragraph "8" of said complaint, this defendant denies generally and specifically each and every allegation therein contained, and the whole thereof.

Wherefore, defendant, Herald Publishing Company, a California corporation, prays that the complaint herein and the amendment thereto be dismissed, and that this defendant have such other and further relief as is just and proper in the premises.

KAUFMAN & LELAND,
By /s/ SIDNEY W. KAUFMAN,

Attorneys for Defendant,
Herald Publishing Co.

Duly verified.

Admitted in evidence as General Counsel's Exhibit 1-K, December 6, 1954.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners
Branch Office—San Francisco, California

Case No. 21-CA-2044

HERALD PUBLISHING COMPANY OF BELLFLOWER,

and

AMERICAN NEWSPAPER GUILD, CIO.

MR. BEN GRODSKY,
For the General Counsel.

MESSRS. KAUFMAN and LELAND, by
BY MR. ROBERT R. RISSMAN,
For the Union.

MESSRS. KAUFMAN and LELAND, by
SIDNEY W. KAUFMAN,
For the Respondent.

Before: Herman Marx, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

On July 21, 1954, American Newspaper Guild, CIO (also described herein as the Guild), filed a charge with the National Labor Relations Board (also referred to below as the Board) against the

Respondent, Herald Publishing Company of Bellflower.[1] The Guild filed an amendment to the charge on August 19, 1954. Based upon the charge, as amended, the General Counsel of the Board issued a complaint on October 14, 1954, alleging that the Respondent had engaged, and was engaging, in unfair labor practices within the meaning of the National Labor Relations Act as amended (61 Stat. 136-163), also referred to herein as the Act. Copies of the charge, the amendment thereof, and the complaint have been duly served upon the Respondent.

With respect to the claimed unfair labor practices, the complaint, as amended at the hearing in this proceeding, alleges in substance that on various occasions during a period beginning on or about July 1, 1954, the Respondent, in violation of Section 8(a) (1) of the Act, engaged in conduct constituting interference with, and restraint and coercion of, its employees in the exercise of rights guaranteed to them by Section 7 of the Act; and that the Respondent, in violation of Section 8(a) (1) and

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[1]The name of the Respondent is stated in the charge and in the complaint, as originally issued, as Herald Publishing Company. The Respondent's correct name is Herald Publishing Company of Bellflower. Upon the General Counsel's motion at the hearing in this proceeding, the complaint was amended to reflect the Respondent's correct name. Pointing to Section 102.12 of the Board's Rules and Regulations, which requires that a charge set forth the "full name" of the party charged, the Respondent took the position at the hearing, in effect, that the misnomer is a bar to this proceeding. The view misconceives the function of a charge. It

8(a) (3) of the Act, discriminatorily discharged four employees, Sol London (on July 17, 1954), Raymond J. Ross (on August 17, 1954), and Gloria Hickey and Doris Farley (both on August 18, 1954) because the said employees had exercised rights guaranteed them by the Act.

The Respondent filed an answer which, as amended at the hearing, in effect denies the commission of the alleged unfair labor practices attributed to it, and asserts in substance that London "was discharged for unsatisfactory services," and that Ross, Hickey and Farley were terminated "solely for economy reasons."

Pursuant to notice duly served upon all parties, a hearing was held before me, as duly designated Trial Examiner, at Los Angeles, California, on December 6, 7, 8, 9, and 10, 1954. All parties were represented by counsel, participated in the hearing, and were given a full opportunity to be heard, examine and cross-examine witnesses, adduce evidence, submit oral argument, and file briefs and proposed findings of fact and conclusions of law. Of the various motions made at the hearing, reference need be

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is not a pleading and "simply sets in motion the investigative machinery of the Board." N.L.R.B. v. Waterfront Employers, 211 F. 2d 946 (C.A. 9). For that purpose, precision in the charge is not essential. N.L.R.B. v. Kingston Cake Co., 191 F. 2d 563, 567, (C.A. 3). Moreover, the Respondent filed an answer addressed to the merits of the complaint, and it is thus evident that it has been in no way prejudiced or misled by the misnomer. The Respondent's position lacks merit. See De Luxe Motor Stages, 93 N.L.R.B. 1425, enforced 196 F. 2d 499 (C.A. 6).

made here only to one, as the record adequately reflects the disposition of the others. Decision was reserved on a motion by the Respondent, after the close of the evidence, to dismiss the complaint on the ground that the Board has no jurisdiction over this proceeding, and that it would not effectuate the policies of the Act to assert such jurisdiction. The motion is hereby denied for reasons set out below. The General Counsel and the Respondent submitted oral argument after the close of the evidence. No briefs have been filed.

Upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Nature of the Respondent's Business; Jurisdiction

The Respondent is a California corporation; maintains its principal place of business in Compton, Los Angeles County, California; and is engaged in the business of printing, publishing, distributing and selling a newspaper known as the Herald American. The newspaper, a semi-weekly publication, is published each Thursday and Sunday. A weekly supplement to the paper, known as "Garden and Home Magazine," is also published each Sunday. The Thursday issue appears in nine editions. Seven editions are issued on Sunday. Each edition is associated or identified with one or more

communities in Los Angeles County. For example, there are separate editions for the communities of North Long Beach, Compton and Bellflower, among others. The newspaper is printed in Compton where the Respondent operates two printing establishments for that purpose, but it also maintains separate offices in various of the other communities where it stations such personnel as advertising and editorial employees. The combined circulation of the Thursday editions is approximately 142,000; the circulation of the Sunday issue is slightly smaller. The Respondent sends no copies of its newspaper to any points outside the State of California. Circulation of the paper is apparently confined to the Los Angeles County communities for which the respective editions are named.

The record is lacking in specificity concerning the amount of the Respondent's annual gross income, and what portions of the revenue are derived from advertising and circulation, respectively. One may, however, spell out enough from the evidence to determine whether the Board has jurisdiction and whether its assertion will effectuate the policies of the Act. The Respondent's annual gross income from the publication of the newspaper exceeds $500,000 (how much in excess does not appear). Although the record contains no figures for the amount of revenue derived from advertising, it is

fairly inferable from the evidence as a whole that the volume of advertising is considerable, and that the newspaper's revenue from advertisements accounts for a substantial portion of its gross income.[2]

The newspaper advertises a variety of products, including what one witness termed "practically every make of popular cars." Automobile advertisements appear in the Herald American every week, but the heaviest concentration of such advertising occurs each year when the automobile manufacturers bring out their new models. Some of the advertisements are placed by advertising agencies, and others by local automobile dealers. The offices of the agencies which place the automobile adver-

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[2]The record reflects only two sources of income, advertising and circulation. Circulation revenue may be roughly approximated. The newspaper sells for 10 cents a copy. About "30% to 40%" of the copies distributed are paid for. Payment at 10 cents per copy for 30% of 142,000 copies issued 104 times in a year would yield annual gross receipts of $443,040 for the given year. As the evidence does not establish by how much the annual gross income exceeds $500,000, it is impossible to determine from the record what proportion of the revenue is derived from advertising. One may safely conclude, however, from the figures given that the advertising income is substantial. Other features of the record which support that conclusion will appear later.

tisements are all located in California.[3] Copy for automobile advertising such as mats used to reproduce pictures of automobiles, are supplied to the newspaper by dealers and advertising agencies, as the case may be. The record does not establish whether any of the copy originates outside the State of California. When an agency places the advertisement, the newspaper usually secures approval of the copy from a local dealer because the latter pays for the advertisement (and, perhaps, although the record is not clear on the point, because the dealer's name appears in the advertising). The evidence, however, does not establish that the dealers are actually the agencies' principals, nor can it be determined in the state of the record whether the authority for the agencies' activities comes either from automobile manufacturers or distributors.[4]

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[3]It is not unlikely, and the record suggests, that at least one or more of the agencies have offices in other states, but the evidence on the subject has insufficient substance to warrant a finding in the premises.

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[4]There is testimony in the record that advertisements placed by the dealers are financed from funds "allotted" to them. The sources of the allotments, whether from manufacturers or distributors, are not identified in the record. The testimony in question is lacking in specificity and concrete detail, and may be of hearsay origin. I base no finding on it.

The Herald American is not a member of any interstate news agency, but it subscribes to, and receives in the mail each week, a news letter issued by the United Press which, it is common knowledge, is engaged in the distribution of news to newspapers throughout the United States. The weekly letters contain "news from various parts of the country." C. S. Smith, president of the Respondent and publisher of the Herald American, denied that the newspaper has actually used the news letters, and he explained the subscription with testimony that the paper had at one time used the wire service of the news agency; that the service was discontinued in or about 1946; and that the Respondent subscribes to the news letters in order to retain some right (not otherwise elaborated in the record) to resume the wire service. Smith also asserted that the newspaper does not publish "anything but local news." However, the "Garden and Home Magazine" supplement to the issue of September 12, 1954, contains a substantial number of items dealing with events that occurred, or places that are located, outside the State of California. The initials U.P. are appended to the bottom of a substantial number of such items on pages 15 and 19 of the supplement (G. C. Exh. 3). The issue for October 21, 1954, contains an article entitled "College Coeds Discuss Campus Fashion." The item is datelined Berkeley, California, and Austin, Texas, with the legend at the bottom: "Written for U.P. by Joyce Williams, University of California, and Patricia Strum, University of Texas."

Smith was interrogated about the source of some of the articles in question, and notwithstanding his prior assertion that the paper publishes only "local news," he speculated that one article dealing with tourist information, attributed to U.P. and datelined Ottawa, "could be out of canned information which is sent to us by some travel bureau." He endeavored to account for the initials with the statement that "that (the item and the initials) could be out of any daily newspaper." With respect to another item attributed to U.P., and captioned "Make Low Bid Pocket Papers on Ohio Town," he testified that the source of the story would be a "rank guess" on his part. When asked whether it would be "consistent" for a newspaper to credit "something to U.P. if it comes from another source," Smith gave the somewhat unresponsive reply: "This is a magazine (the supplement) which is headed by a girl who has practically carte blanche on it. She doesn't have service (sic) to these various (news) letters and wherever she picks the stuff, we have let her go on it because she gets it locally or everything is sent to her by some local agent. There is no policy on it except interesting reading."

Smith's testimony as to where the U.P. stories "could" have originated is obviously speculative, and I am unable to accord any probative weight either to such speculation or the assertion that an employee with "carte blanche" authority secured the stories "locally" or from "some local agent" (not otherwise identified). Similarly, I am unable to give any operative weight to his claim in effect

that the "girl who has practically carte blanche" in the preparation of the magazine has not used the United Press news letters. Sol London, one of the dischargees involved in this proceeding, testified that he was stationed at the newspaper's Compton headquarters prior to July, 1953; that while employed there he used to open the mail; that "material from United Press" came to his desk in the mail; that he asked either Jack Cleland, city editor, or W. W. Butler, managing editor, what disposition should be made of the material, and was instructed by one or the other to turn it over to "Home and Garden."[5] While London stated that he could not recall whether it was Cleland or Butler who gave him that instruction, it may be noted that the record contains no denial by either Cleland (who did not testify) or Butler (who did) that the instruction described by London was given to him. Moreover, various facets of Smith's testimony substantially detract from the force of his claim that the person in charge of "Home and Garden Magazine" has not used the news letters. In the first

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[5]Unlike Butler, Cleland, as will appear, is not a supervisor within the meaning of the Act. However, when London was hired, Butler told him that he "would be working under" Cleland, and, while London was stationed in Compton, Cleland exercised some authority over him from time to time. At the least, Cleland was vested with apparent authority over London in the Compton office. Therefore, London's description of an instruction from Cleland regarding the disposition of the United Press material is competent evidence.

place, as already noted, Smith was unable to give the actual source of any of the stories credited to U.P. Second, he operates other enterprises, and he testified at more than one point that prior to September 1, 1954, his participation in the active management of the newspaper was "on a very small part-time basis." According to his testimony, he is now active as general manager, but he has no "regular office" at the headquarters of the newspaper in Compton and transacts most of his business at his home. Thus, it may be asked, how may one conclude from Smith's testimony that the person in charge of the magazine had no access to the news letters and did not use them? A negative answer is required not only by the features of his evidence pointed out above but by other aspects of his testimony. When questioned about recent news stories (appearing after he assumed the title of general manager) pertaining to new automobile models, he replied that he did not have "the slightest idea" as to the source of the articles or as to the identity of the individual in his organization who "would know where these news items come from." He explained his lack of personal knowledge with the statement, "I have one hundred and eighty people in the organization." In sum, it seems to me that this explanation by Smith applies with equal force to his claim that the individual in charge of the "Home and Garden" supplement has not used the United Press news letters in preparing the news items attributed to U.P., initials which obviously are abbreviations for United Press.

The fact that the news letters are not in evidence does not preclude an inference that the U.P. stories came from the news letters. The basic facts are that the Respondent subscribes to United Press weekly news letters which contain "news from various parts of the country"; publishes news stories concerning events occurring, and places located, outside California; and attributes items of that nature to U.P. or, in other words, to United Press, as the source. Moreover, London's testimony described above, is uncontroverted and contributes weight to the conclusion that the news letters have been used as the source of stories in the supplement. In short, there is evidence which reasonably warrants an inference that the stories credited to United Press came from the news letters. To escape such an inference, it seems to me that some duty devolved upon the Respondent to go forward with probative evidence negating it, particularly as information shedding light on the matter is within its special knowledge. The Respondent produced no such evidence, nor has it explained its failure to do so. Certainly, Smith's speculations as to the possible sources of the U.P. stories, his inaccurate assertion that the Herald American prints only "local news," and his generalization that the person in charge of the supplement "doesn't have service to these letters," do not probatively negate the inference. The weight of the evidence supporting the inference is enhanced by the failure of the Respondent to present any probative evidence, peculiarly within its

knowledge, as to the source of the U.P. items. See N.L.R.B. v. Ohio Calcium Company, 133 F. 2d 721 (C.A. 6). Accordingly, I find that such news items were furnished to the Respondent by United Press and were based upon, or taken from, one or another of that organization's weekly news letters.[6]

In August, 1954, the Respondent purchased publication rights to three cartoon features, each of which is issued by a different syndicate. Two of the syndicates are located in New York, and the third in Chicago. The publication rights were purchased from "a Glendale, California, broker" who in turn ordered the features for the Herald American from the syndicates. Publication of cartoons received from one or the other of the syndicates was begun by the Respondent on August 25, 1954, and discontinued on December 8, 1954, while the hearing in this proceeding was in progress. The Herald American customarily used one or another of the features as "filler" material in one or two of the community editions of each issue.[7]

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[6]The Respondent also subscribes to and receives from United Press another weekly news letter which deals with events in Sacramento, California's state capital. Smith denied that the newspaper uses this letter, and there is no evidence to the contrary. Jurisdictional findings made below are not based on the Sacramento news letters.

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[7]The issues for October 14 and December 2, 1954, are typical of the use of the cartoons. On the first date, of the nine editions, only the Downey-Riviera and Paramount-Hollydale editions contained car-

The Respondent contends in effect that its operations do not affect interstate commerce, and that the Board is thus without jurisdiction over this proceeding. An alternative contention is that the assertion of jurisdiction, if the Board has it, would not effectuate the policies of the Act. The Board has recently adopted criteria (to be described later) by which it intends to be governed in its assertion of jurisdiction over newspapers. It may be noted that the alleged unfair labor practices attributed to the Respondent antedated this expression of Board policy. For that reason, as well as the fact that the relevant criteria are of recent origin, I think it appropriate to refer not only to the applicable current policies but to some aspects of criteria in effect prior thereto.

In 1950, in a series of decisions, the Board announced certain criteria by which it would be governed in its assertion of jurisdiction. The criteria, some but not all prescribing dollar volume standards, were respectively applicable to different situations or types of enterprises and need not be described in detail.[8] It need only be noted that in one

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toons, the latter publishing two. The December 2 issue published two cartoons, both appearing only in the Norwalk community edition. The fact that the cartoons were used as "filler" is immaterial. The point to bear in mind is that they were used frequently during the period of the subscription.

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[8]For the criteria see: WBSR, Inc., 91 NLRB 630; W. C. King, d/b/a Local Transit Lines, 91 NLRB 623; The Borden Company, Southern Divi-

of the policy decisions the Board announced that it would continue to take jurisdiction "over instrumentalities and channels of interstate * * * commerce" (WBSR, Inc., 91 NLRB 630, involving a radio station); and that shortly thereafter this standard was applied to a newspaper because of "its membership in interstate news services" (Press, Incorporated, 91 NLRB 1360). As evidenced by the Press decision, the assertion of jurisdiction over newspapers after the announcement of the 1950 policy standards (and, as will appear, prior to 1954) was based not upon standards particularly applicable to newspapers, as such, but upon findings that criteria announced in one or another of the 1950 decisions were applicable.[9]

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sion, 91 NLRB 628; Stanislaus Implement and Hardware Company, Limited, 91 NLRB 618; Hollow Tree Lumber Company, 91 NLRB 635; Federal Dairy Co., Inc., 91 NLRB 638; Dorn's House of Miracles, Inc., 91 NLRB 632; The Rutledge Paper Products, Inc., 91 NLRB 625; Westport Moving & Storage Co., 91 NLRB 902.

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[9]In the recent case of The Daily Press, Incorporated, 110 NLRB No. 95, the Board appears to have assumed that in 1950 it adopted criteria specially applicable to newspapers, as such. That case, citing Press, Incorporated, supra, and apparently relying on it, contains the following statement: "Among the standards adopted in 1950 was the so-called 'newspaper' standard. Pursuant to this standard, the Board asserted jurisdiction over all newspaper companies which hold membership in or subscribe to interstate news services, or publish nationally syndicated features, or advertise nationally sold products * * *" (emphasis supplied).

In Wave Publications, Inc., 106 NLRB 1064, the Board had occasion to pass on the applicability of the 1950 standards to a California newspaper of a type somewhat similar to the Herald American. Like the latter, the publication in the Wave case had an annual gross income in excess of $500,000, much of it derived from advertising revenue; held no membership in "any interstate wire service"; subscribed to "syndicated cartoons" which were sent to it from points outside California; and, among various types of advertising, carried advertisements of "national products" placed both by advertising agencies and "local merchants." Unlike the evidence in this proceeding, the record in the Wave case establishes concretely that adver-

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It may be respectfully pointed out the 1950 Press decision did not establish policy standards in quite those terms. Although the Board made commerce findings in the Press case based, in part, on the newspaper's advertising and its publication of syndicated features, a careful reading of the decision requires the conclusion that the governing factor for the assertion of jurisdiction was not a policy standard particularly applicable to newspapers, as such. For its basic holding in the Press case that the assertion of jurisdiction would effectuate the policies of the Act, the Board, citing and applying a case involving a radio station (WBSR, Inc., 91 NLRB 630), invoked its previously announced policy of taking jurisdiction over instrumentalities or channels of interstate commerce, pointing out that the newspaper involved was such an instrumentality or channel because of "its membership in interstate news services." Moreover, that advertising of "nationally sold products" was not

tisements of "national products" were placed by "national advertising agencies located outside California"; and that "local merchants" who placed advertisements of "national products" were "reimbursed, in part, for the expense involved in advertising the national product(s), by the national manufacturer." Also, unlike this proceeding, the record in the Wave case contained concrete evidence of the value of goods or services purchased by the employer outside California. The Board found that for a given annual period, the publication "purchased materials and supplies valued at $225,000, of which approximately 70 per cent was shipped directly to the Company from outside California"; and that "in addition, the Company paid out about $3,000 annually for syndicated cartoons, columns, and advertising mat services distributed

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of itself a criterion (before 1954) for the assertion of jurisdiction is made manifest by Wave Publications, Inc., 106 NLRB 1064, decided August 28, 1953). There the Board declined to assert jurisdiction, although finding that the newspaper advertised "national products" and received "syndicated cartoons" from outside the state. In taking that position, the Board pointed out in some detail that the newspaper met none of the dollar volume or other criteria announced in 1950, thus implying that at the time of the Wave decision there was no separate "'newspaper' standard" and that the assertion of jurisdiction over newspapers turned on whether they met any of the standards announced in the 1950 policy decisions. To the same general effect, see, also, Mutual Newspaper Publishing Co., 107 NLRB No. 127, and J. Weiss Printers, 92 NLRB 993.

from outside California." The Board held that, although it had jurisdiction, it would not assert it because the facts did not establish "that the Company's operations meet any of the announced requirements for the assertion of jurisdiction."[10]

The Respondent relies upon the Wave decision for support of its position. Although the commerce facts relating to advertising and syndicated features afforded a stranger basis for the assertion of jurisdiction in the Wave case than do comparable facts in this proceeding, it may be noted that the newspaper involved in the Wave decision, unlike the Herald American, did not subscribe to an interstate news service. In any event, for reasons that will appear the Wave decision is not decisive of the jurisdictional issues presented here.[11]

In 1954, the Board, in a series of decisions, announced new criteria for the assertion of jurisdiction. In the main, these were revisions of the preexisting policies. With one exception, detailed reference need not be made to the new policy deci-

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[10]The Board's holding in the Wave case should be distinguished from a prior decertification proceeding involving the same employer, reported at 90 NLRB 274. There the Board asserted jurisdiction, but in its second decision, the Board pointed out that its earlier decision antedated the adoption of the 1950 criteria.

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[11]For the same reasons, Mutual Newspaper Publishing Co., 107 NLRB No. 127, and J. Weiss Printers, 92 NLRB 993, both cited by the Respondent, are not controlling.

sions,[12] for only one of them is pertinent here. The case in question is The Daily Press, Incorporated, 110 NLRB No. 95. There the Board announced * * * "that in future cases the Board will assert jurisdiction over newspaper companies which hold membership in or subscribe to interstate news services, or publish nationally syndicated features, or advertise nationally sold products, if the gross value of the business of the particular enterprise involved amounts to $500,000 or more per annum" (emphasis supplied). Several features of the quoted language may be noted. First, apart from the monetary standard, the other criteria are stated in the disjunctive. Thus, for example, a newspaper with a gross annual income of at least $500,000 meets the standards if it advertises "nationally sold products" whether or not it also holds membership in or subscribes to interstate news services, or publishes "nationally syndicated features." Second, the assertion of jurisdiction is not conditioned upon any dollar volume of advertising income or of payments for nationally syndicated features, nor upon the

[12]For announcements of new criteria see: Breeding Transfer Company, 110 NLRB No. 64; Greenwich Gas Company and Fuels, Inc., 110 NLRB No. 91; Hogue and Knott Supermarkets, 110 NLRB No. 68; McKinney Avenue Realty Company, 110 NLRB No. 69; The Daily Press, Incorporated, 110 NLRB No. 95; Maytag Aircraft Corporation, 110 NLRB No. 70; Insulation Contractors of Southern California, Inc., 110 NLRB No. 105; Wilson-Oldsmobile, 110 NLRB No. 74; Jonesboro Grain Drying Cooperative, 110 NLRB No. 67.

regularity or frequency with which such features are used. Third, the application of the advertising criterion does not hinge upon the location of the advertiser or the source of the advertising. In other words, the criterion is applicable irrespective of whether the advertiser is the producer of the "nationally sold products," an advertising agency, or a "local merchant," or whether the person or firm placing the advertisement is located in the same state as the newspaper. The advertising standard requires only that the commodities advertised be "nationally sold products." Finally, it is evident that although The Daily Press decision did not expressly overrule the Wave case, the policy announcement in the former supersedes the holding of the Wave decision and must be held, by implication, to overrule the holding relating to advertising of what the Board in the Wave case termed "national products" (a phrase which apparently means the same as the term "nationally sold products" used in The Daily Press decision). It seems clear that had the standards announced in The Daily Press case been in effect at the time of the Wave decision, the Board would have concluded in the latter case that the assertion of jurisdiction would effectuate the policies of the Act, if for no other reason than that the newspaper met the monetary and advertising criteria of The Daily Press case.

Applying the criteria of The Daily Press case to the evidence in this proceeding, it may be noted initially that the Respondent's annual gross income

meets the monetary standard. The only question is whether any one of the other criteria is met. On that score, the subscription to the United Press weekly news letters "containing news from various parts of the country" is of itself a sufficient basis for the assertion of jurisdiction.[13] But that is not the only ground established by the evidence. The Herald American advertises many types of commodities, but, with one exception, it is unnecessary to consider which of these are "nationally sold products."[14] Whether any other types of products

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[13]The evidence does not establish from what location the news letters are mailed, but that is immaterial.

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[14]As this may be one of the earlier cases involving the new newspaper criteria to come before the Board, I take the liberty to set out some questions which the advertising standard suggests, so that the Board may address itself to the questions, if it deems some clarification of the standard to be appropriate. To be considered as "nationally sold products" must the goods be sold throughout the nation, or is it enough that they are sold in a substantial number of states? To what extent may one infer that goods are sold "nationally" from the fact that they are so-called standard brands. If such an inference may be drawn, what products may be regarded as standard brands? What products are so well known to the American public that one may take judicial notice that they are "nationally sold," and how extensive must such knowledge be before the doctrine of judicial notice becomes applicable? These are not idle questions, for at least some of them are suggested by evidence the General Counsel presented in this proceeding. He appears to assume, and to seek a finding, that various commodities such

mentioned in the record qualify for the term, the controlling facts are that the advertisements include those of "practically every make of popular cars," and that such automobiles are, without a doubt, "nationally sold products."[15] As already noted, evidence that the advertising of such products comes from, or is financed by, sources without the state is not a precondition of the application of the standard. Thus the question of jurisdiction is unaffected by the fact that the automobile advertisements are placed by local dealers or advertising agencies located within the state (although it may be noted that Ralph J. Brewer, formerly general manager and now vice-president of the Respondent,

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as Cinch cake-mix, Burgermeister beer, Luzianne coffee, Norway sardines, Hills Brothers coffee, Playtex brassieres, and Lucky Lager beer, all advertised in the Herald American, are "nationally sold products" even though no evidence was adduced that they are sold "nationally." Perhaps one may take judicial notice that one or more of these products are sold "nationally." I find it unnecessary to do so, nor to make any findings concerning any of the enumerated products, in view of the conclusion reached herein with respect to the automobile advertising.

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[15]It is common knowledge that what are termed in the testimony as "popular cars" (for example, Chevrolets, Fords, and Packards) are sold throughout the United States. Thus, I take judicial notice that these are "nationally sold products." Cf. N. L. R. B. v. Townsend, 185 F. 2d 378 (C. A. 9), cert. den., April 16, 1951, U. S.; N. L. R. B. v. Howell Chevrolet Co., 204 F. 2d 79 (C. A. 9); affirmed 346 U. S. 482.

testified that agencies "perhaps" act "for the manufacturer," and in other instances, "for the local dealers association"). The evidence does not establish the amount of income derived by the Respondent from automobile advertising, nor the volume of the advertisements, but the absence of such evidence does not affect the assertion of jurisdiction here, for the applicable criterion requires no such precision in proof. Brewer testified that the newspaper receives automobile advertising from one agency or another every week; that such advertising is heaviest each year at the time when the new automobile models are introduced; and that "we have been very heavy recently in that type of advertising." He also stated that new models were being introduced at the time of the hearing, and indicated that "a lot of money" was being spent for their advertisement. From such testimony, the conclusion is unavoidable that a substantial, even though unspecified, portion of the newspaper's advertising volume and revenue is derived from advertisements of "nationally sold products." Thus the Herald American meets the advertising standard announced in The Daily Press case.

Turning to the cartoon features, one may exclude them from consideration and, on the basis of facts meeting the other criteria, still emerge with the conclusion that the Respondent's operations affect interstate commerce and that the assertion of jurisdiction will effectuate the policies of the Act. However, as the parties dealt with the cartoons at the

hearing as relevant to the question of jurisdiction, findings relating to the syndicated features are appropriate.

The Respondent received the cartoons published between August 25 and December 8, 1954, from sources outside the state, and by reason of that fact was, during the period in question, engaged in interstate commerce, notwithstanding the circumstance that the purchase of the publication rights was made either from or through a broker in California.[16] A question arises, however, whether the evidence establishes that the cartoons are "nationally syndicated features." Only one of the cartoon features published by the Herald American is clearly identified. It bears the name "Angel." There is no evidence that it is published in any other newspaper. There is also no basis for judicial notice of such publication. This applies with even greater force to the other two features, for these are not even identified by name in the record.

From the nature of the evidence the General Counsel adduced, even if not from any explicit

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[16]The fact that the publication of cartoons was discontinued during the hearing does not affect the Board's jurisdiction. Nor is it material that the publication began after the discharges and other conduct alleged in the complaint as unfair labor practices, for jurisdiction is not conditioned upon a coincidence in time between the commerce facts and the alleged unfair labor practices, but is based upon the "over-all operations of the employer" (Paul W. Speer, Inc., 94 NLRB 317).

statement made by him, I gather that his position is that a feature is syndicated "nationally" if it is distributed by a syndicate of national scope, even if the feature itself is not distributed "nationally." There may be good reason for grounding the assertion of jurisdiction over a newspaper upon such a theory, but a literal reading of the criterion does not support such a construction. I read the standard embodied in the phrase "nationally syndicated features" to mean that the "features" must be distributed "nationally," and not that there need only be a showing that they are distributed by a syndicate operating "nationally," however limited the distribution of the particular "features" may be. Thus I hold that the evidence in this proceeding does not establish that the cartoons published in the Herald American are "nationally syndicated features."[17]

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[17]It was stipulated at the hearing that the three cartoon features were ordered, respectively, from Harry Cook Syndicate (also known as Bell Syndicate, of New York; the Chicago Sun Times, of Chicago; and McNaught Syndicate, of New York. Quite apart from my interpretation of the criterion, as set out above, it may be noted that the evidence bearing on the scope of the operations of the three syndicates is scant. "Angel" is attributed to none of the three in the evidence but to an organization named Field Enterprise, Inc., which also supplies features to the Chicago Sun Times, a newspaper. It may be that Field Enterprise, Inc., and the Chicago Sun Times are one and the same, but the evidence does not establish that fact. The General Counsel presented no evidence that the Chicago Sun Times and McNaught Syndicate have distributed

With respect to the jurisdictional issue, one additional matter requires comment, and that is whether the date (October 26, 1954) of The Daily Press decision precludes the application of the criteria announced therein to a case involving claimed unfair labor practices alleged to have occurred prior to the announcement. There have been cases where the Board declined to assert jurisdiction over an employer charged with unfair labor practices allegedly committed before the announcement of applicable criteria. But these were situations where the employer was involved in a prior proceeding in which a position had been taken by the Board, or expressed by one of its representatives, to the effect that jurisdiction would not be asserted on the basis of policies then in effect.[18] This is not such a case. Nor does the holding in the Wave decision preclude the assertion of jurisdiction. To be

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features to any newspaper other than the Herald American. Whatever moral conviction one may have about the matter, the fact-finder may not substitute mere opinion for proof. There is evidence that the Herald American published two Bell Syndicate cartoons on September 16, 1954, and no proof that it did so on any other day. The only evidence of publication in any other paper of Bell Syndicate features consists of proof that two cartoons (not identified by name in the record) attributed to that concern appeared in a New York newspaper on November 30, 1954.

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[18]Yellow Cab Co. of California, 93 NLRB 766; Screw Machine Products Co., 94 NLRB 1609; Almeida Bus Service, 99 NLRB 498; Tom Thumb Stores, Inc., 95 NLRB 57. The Screw Machine case

sure, the Board declined to assert jurisdiction there on the basis of advertisements of "national products." But assuming, without agreeing, that the advertising criterion should not be applied to this proceeding, there is still a vital distinction between the newspaper in the Wave case and the Herald American.[19] Unlike the former, the Respondent subscribes to an interstate news service and publishes news supplied to it by the agency. Such a subscription is clearly analogous to "membership in interstate news services," on the basis of which the Board held in the Press case in 1950 that the policies of the Act would be effectuated by the assertion of jurisdiction, grounding the holding on the fact that such membership constituted a newspaper an instrumentality or channel of interstate commerce. I think that one can hold with equal logic that subscription to and use of news letters of an interstate news agency such as United Press constitutes the

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left open the question whether a complaint would be dismissed "solely because the alleged unfair labor practices occurred at a time when the Board would not have asserted jurisdiction over the particular employer involved."

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[19]In passing, it may be noted that no claim is advanced here, nor is there any evidence, that the Respondent has in any way been misled by the Wave decision or by any of the other cases it cites. It is palpably not the Respondent's position that it engaged in conduct alleged to be unfair labor practices because it assumed, on the basis of the Wave or any other decision, that the Board would not assert jurisdiction.

subscribing publication an instrumentality or channel of interstate commerce.[20] It is thus evident that at the times when it is alleged unfair labor practices were committed, the Respondent's operations met a standard prescribed by the Board for the assertion of jurisdiction.[21] Couched in different terms for specific application to newspapers, that standard has been in effect made part of the current criteria announced in The Daily Press case.

Viewing the evidence as a whole, I find that the Respondent's operations affect interstate commerce; that the Board has jurisdiction of this proceeding; and that the assertion of jurisdiction will effectuate the policies of the Act.

II. The Labor Organization Involved

American Newspaper Guild, CIO, admits persons employed by the Respondent to membership and is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. Prefatory Statement

The Respondent employs approximately 180 persons. These are distributed among the various

[20]The concluding paragraph of the separate opinion of Board Members Murdock and Peterson in The Daily Press case suggests a similar view. With respect to such a position, the majority opinion in the case is not to the contrary.

[21]For this reason alone, without regard to other factors, N. L. R. B. v. Guy F. Atkinson Company, 195 F. 2d 141 (C. A. 9) is distinguishable.

establishments maintained by the Respondent, and include cashiers, editorial employees, PBX (switchboard) operators, classified advertising personnel, and advertising salesmen. (The newspaper is printed by mechanical department employees. They are not involved in the allegations of unfair labor practices.)

As stated earlier, C. S. Smith is president of the Respondent and publisher of the newspaper. He has complete control over its policies and operations. Ralph I. Brewer was general manager of the newspaper for many years prior to September, 1954, and, in that capacity, subject to Smith's authority, exercised general supervision over the newspaper's affairs. Because of ill health, Brewer relinquished the post of general manager in September. In that month he was made vice president of the Respondent, and Smith assumed the title and role of general manager.

Other supervisors function on a departmental or otherwise specialized basis. Thus supervision over editorial personnel is vested in W. W. Butler who holds the title of managing editor. He has, and exercises, authority to hire and discharge editorial personnel. Direction of the newspaper's classified advertising is vested in Leonard Lugoff. Lugoff supervises the work of employees in his department, and has authority to hire and discharge classified advertising personnel. Another departmental supervisor is named Louis M. Murray. He has the title of sales manager and functions as

"head salesman."[22] Murray is vested with, and exercises, authority to make recommendations for the hiring and discharge of sales personnel. Smith testified at one point that on some occasions he accepted Murray's recommendations, and rejected them on others. However, the fact that Murray's recommendations carry particular weight is evidenced by Smith's later testimony that he has found Murray to be a "very good judge of people" and that he has approved "practically everyone that he (Murray) has wanted to employ when we had vacancies."

Smith, Butler, Brewer, Murray and Lugoff are, and have been at all times material to this proceeding, supervisors within the meaning of the Act.

The General Counsel contends that two employees, Robert Clark and Jack Cleland, were, during relevant periods, supervisors within the purview of the Act; and that for that reason certain statements made by these individuals are imputable to the Respondent. The Respondent took the position at the hearing that Clark and Cleland have no such supervisory status. Although both are still in the Respondent's employ, neither was called as a witness.

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[22]Smith initially described Murray's title as "salesman." He later referred to Murray as "head salesman," but asserted that "he isn't the sales manager though." The fact is that Murray's name is listed on the Respondent's printed letterhead with the title of "sales manager" (see G. C. Exh. 1-J).

Clark is stationed in the newspaper's Lakewood office, and has the title of general manager of the Lakewood-Los Altos edition of the Herald American. In addition to Clark, there are four other employees stationed in the Lakewood office. These consist of two sales people, a "circulation man" and a classified advertising employee.

There is observable in Smith's testimony an effort to water down the facts pertaining to Clark's status in order to negate an inference that the latter was a supervisor during the period of alleged unfair labor practices. The way Smith put it at one point, Clark "calls himself the general manager of the Lakewood Herald American" (emphasis supplied). But later Smith testified that Clark "was elected a member of the Chamber of Commerce out there so we gave him a higher sounding title" (emphasis supplied). Moreover, that Clark's title is not merely self-imposed is suggested by the fact that the masthead of the Lakewood-Los Altos edition for October 21, 1954, lists Clark as "general manager." Smith attempted to minimize that with the assertion that "there is a line between Mr. Butler and Clark" (in the list of names in the masthead). However, the masthead for the edition of September 16, 1954, which is somewhat different in composition from the October 21 edition, listing Clark as "local manager," contains no line separating any of the names. As to that, Smith offered the vague statement that "that was the line up (presumably the names on the masthead) at that time

but it changed after that," and that "Mr. Brewer was on vacation and he had just taken off." The suggestion is not made here that Clark's title is decisive of his status or that the presence or absence of a line between names listed in the masthead is significant. (It was Smith who sought to make a significant point of the line.) The features of Smith's testimony, set out above, are mentioned because they reflect on Smith's credibility as a witness. They are reminiscent of his assertion, contrary to the documentary facts, that the newspaper does not publish "anything but local news," and his claim, not important of itself but symptomatic of a pattern in his testimony, that Murray "isn't the sales manager," although the Respondent's letterhead lists that title for Murray.

According to Smith, Clark as "manager of the Lakewood Herald American" before he was given the title of general manager about three weeks before the hearing. While "manager," Smith testified, Clark "had no authority ever to watch their work" (the work of the other four employees). If that is so, then one may ask why Clark had the title of "manager." Be that as it may, at a later point, he stated that before Clark was made general manager, the latter had the responsibility of directing the two sales employees in the Lakewood office to perform given functions. Smith volunteered, however, that Clark "was only exercising his responsibility in a perfunctory manner." Here, too, I am persuaded that this statement is part of a

pattern in Smith's testimony of attempting to dilute the real nature of Clark's status.

In any event, whether Clark performed his supervisory work in a "perfunctory" manner or not is beside the point. Mere neglect by a supervisor of his duties does not constitute him any the less a supervisor within the purview of the Act. The statutory test is whether he is vested with authority to perform various acts, among them, "responsibly to direct" the work of others. Even if one agrees with Smith that Clark, while "manager," had authority only over the two sales people, that is not a controlling factor. The important question is whether the authority he was supposed to exercise, was not merely of a "routine or clerical nature, but required (d) the use of independent judgment." That it was not of a "routine or clerical nature" is manifested by some testimony Smith gave, signifying that the Respondent regards Clark's authority as having substantial importance. Smith testified that Clark, as "top salesman," was "so busy himself that he was neglecting to outline the work for the other salesmen." Then, according to Smith, about a week before the hearing, "we called him in and made complete lists of all customers in that district and told him to allocate certain customers to certain salesmen and them (sic) he was responsible for seeing that those customers were called on." The circumstance that a more efficient and formalized system of direction of the other salesmen was set up only recently does not alter the fact that Clark

had similar supervisory responsibility prior thereto, for, as Smith also testified, "up until last week * * * all he did was he was supposed to supervise them and would make out lists of certain customers and he allocated certain customers to certain salesmen." Moreover, with respect to the period before the "complete lists" were prepared, Smith's own testimony indicates that the Respondent looked to Clark for something more than the allocation of "certain customers to certain salesmen," for Smith testified with respect to a given sales venture: "He (Clark) had one man take over when he could not handle it. That is the only specific case that I know of where he actually paid attention to the man who worked with him, whose work he was responsible for" (emphasis supplied). Here, too, this may indicate that Clark was remiss in his attention to his supervisory duties prior to the preparation of the "complete lists," but the important point is that it also indicates that he was "responsible for" the work of others and was vested with, and exercised, authority to use selective discretion in the assignment of tasks. Notwithstanding the infirmities in Smith's evidence, I draw the inference from his testimony as a whole that Clark had such authority and was "responsible for" the work of others when he had the title of "manager," as distinguished from that of "general manager." In sum, Clark is now, and was at all relevant times, a supervisor within the meaning of the Act.

Although Smith at one point described Cleland as "editor or head newsman" of the Lynwood edi-

tion, also terming Cleland "city editor of the Compton paper," the publisher denied that any reporters "work under" Cleland and that the latter has authority to give instructions to any other employee. However, it is undisputed that Butler told London, when hiring the latter in July, 1950, that he "would be working under" Cleland, and instructed Cleland to assign London to "some stories" during the coming week. London, who was transferred from the Compton headquarters to the North Long Beach office in July, 1953, testified that prior to his transfer, editorial employees received assignments to cover news events from Cleland, as well as Butler; and that on occasions when Butler was absent, Cleland performed the former's functions. Butler testified in effect that his absences were infrequent and usually of short duration; that "no one" was in charge during such absences, but that on such occasions he would call by telephone and give "instructions on various things" to "various people"; that during his vacations it was usually Brewer "who took over"; and that Cleland's "only activity" other than reporting, "was co-ordination of news." Butler agreed that he "sometimes" used Cleland "as a contact man" and "probably" more so than he did anyone else. Butler's testimony contains no specific denial that Cleland distributed reportorial assignments from time to time, nor does it elaborate on the instructions he gave by telephone to "various people." Bearing in mind Cleland's function as co-ordinator of news and as Butler's "contact man," it is not

improbable that Cleland, upon specific instructions from Butler, performed supervisory functions from time to time as a substitute for Butler while the latter was absent. On the other hand, it is quite likely that such occasions were infrequent and of short duration. Upon close examination, there is no inevitable major inconsistency between London's version of Cleland's duties and that given by Butler, for the latter's testimony does not quite exclude the possibility that Cleland acted for him from time to time, while London's account contains no concrete measure of the extent to which Cleland acted as a substitute for Butler. Against the background of the infirmities in Smith's testimony, mentioned above, and others to be noted later, London's undisputed version of his conversation with Butler in 1950, London's description of Cleland's duties, and Butler's testimony on the subject, I am persuaded, contrary to Smith's claim, that Cleland, at least from time to time, exercises some authority over other employees, and gives them instructions in the form of work assignments. Moreover, it would seem that Smith's own description of Cleland as "head newsman" implies the existence of newsmen subordinate to the "head." The evidence, however, is insufficient to support a finding that Cleland's authority and functions are of such a nature as to constitute him a supervisor within the purview of the Act. There is good reason to believe that Cleland has substituted for Butler from time to time, as London claims, but I draw

the inference that such occasions have been relatively infrequent and that Cleland has spent only a small portion of his time substituting for Butler. An employee does not acquire a supervisory status within the meaning of the Act simply because he spends a small percentage of his time supervising others during occasional absences by his superior. N. L. R. B. v. Quincy Steel Casting Co., 200 F. 2d 293 (C. A. 1). The fact that London and others have received work assignments from Cleland is not of itself decisive, for, unlike the evidence pertaining to Clark, one is unable to determine from the record whether Cleland's functions in that regard were of a routine character or whether he was vested with responsibility for seeing that the assignments were properly carried out. Thus I hold that the evidence does not establish that Cleland is a supervisor within the contemplation of the Act.

The Guild made efforts to organize employees of the Respondent in the spring and summer of 1954. As will appear in more detail later, Sol London, Doris Farley, Raymond J. Ross, and Gloria Hickey either engaged in union activity or manifested their interest in the Guild at one point or another during that period.

It is undisputed that London was discharged in July, 1954, and Hickey, Ross, and Farley in the following month. The General Counsel contends, and the Respondent denies, that they were dismissed because of their union activities or affiliation. The General Counsel also contends that the

Respondent interfered with, restrained and coerced employees, during the month of July, in the exercise of rights guaranteed them by Section 7 of the Act, by various statements and acts of supervisors, including an attempt to engage in surveillance of what it believed to be a union meeting; threats to discharge employees who engaged in union activities; and the granting of wage increases to employees in order to dilute their interest in unionization. There is no dispute that the wage increases were given, but the Respondent denies that any unlawful motive was behind them. With some exception to be noted later, the supervisors to whom the General Counsel imputes acts or statements constituting interference, restraint and coercion, deny that they engaged in such conduct. Evidence bearing on the allegations of interference, restraint and coercion will be considered first below, and will be followed by a consideration of the motivation for the discharges.

B. Evidence of Interference, Restraint and Coercion.

Turning first to the alleged attempt at surveillance, the allegation rests upon the testimony of William L. Sheets, who is employed in one of the community offices of the Herald American. Sheets testified that when he came home from work one afternoon shortly after London's discharge (either on the same day or the next, according to Sheets' estimate), he found Murray there; and that Mur-

ray told him that he had come to see if a union meeting was in progress at the house. Then, Sheets testified, he asked the reason for such an assumption, and Murray replied that he had heard Sheets inviting Ross to his home "to pitch horseshoes"; had assumed that "horseshoes was the code word to signify the intention of calling a union meeting"; and had called on Sheets "to verify it." According to Sheets, Murray then "apologized for his misapprehensions."

Murray, called by the Respondent, agreed that he visited Sheets' home on the occasion in question, but described a different motive for his visit. Stating that he has known Sheets for several years and that the latter "has had a liquor problem," Murray asserted that he had heard Sheets "make a remark (in the office) that he was going to play horseshoes"; that to him (Murray) that meant "opening a keg of nails" (or to "get drunk," as Murray later explained); that Sheets "lives in the same general neighborhood" as he; and that on his way home, as he was convinced that Sheets meant that he was going to get drunk, he stopped at Sheets' house "to see if everything was O.K." Murray stated that Sheets was not there when he arrived; that he talked to Sheets' wife, discovering during his talk with her that Sheets had a "horseshoe pitch" in his home; that Sheets came in about 20 minutes after his arrival; and that he "kidded (Sheets) about the horseshoe incident," explaining, "Bill, I got your remark on the horseshoes and I

thought perhaps there was something I missed, so I came over." Murray denied that he visited Sheets' home in order to see if a union meeting was in progress or that he had been instructed by any of his superiors to go there for that purpose.

If it be asserted that there is some implausibility in Sheets' claim that Murray said that he took the former's reference in the office to horseshoes as a "code word," the fact is that Murray's testimony, too, indicates that he gave a euphemistic interpretation to the remark. Thus the testimony of both witnesses would indicate that Murray did not accord a literal meaning to the remark he claims he heard Sheets make in the office.

Be that as it may, on the credibility issue presented, one matter, among others, to keep in mind is that there is no evidence that Sheets has any interest in the outcome of this proceeding. He is currently in the Respondent's employ. What is more, he appears to have a position of some responsibility, since his name and title of "division editor" are listed in the masthead of the Lakewood-Los Altos edition of the Herald American, and the evidence indicates that he is the second highest paid nonsupervisory editorial employee (see G. C. Exh. 16). Against that background, no reason appears why he should give testimony contrary to his employer's interest without a valid basis. In short, Sheets impressed me as a truthful and disinterested witness. In contrast, Murray's testimony reflects some unconvincing features not only with respect to the in-

cident under consideration, but, as will appear later, in connection with Farley's discharge. Why he should not have given a remark about pitching horseshoes a literal construction, rather than interpreting it to mean that Sheets meant to "open a keg of nails" (also a euphemism) does not plausibly appear. Murray offered the explanation that Sheets had been addicted to alcoholism, stating, also, that he "knew that (Sheets) did not play horseshoes." (Admittedly, he found a "horseshoe pitch" at Sheets' home, although claiming to be unaware of its existence before his visit.) However, he agreed that he had not seen Sheets in an intoxicated state for about a year prior to the alleged remark about pitching horseshoes. Moreover, Murray's description of the setting in which he claims the remark was made has a note of vagueness. He professed not to be able to remember to whom the remark was made, although agreeing that Sheets "was talking to someone else" whom he (Murray) did not "associate with drinking." At one point, Murray testified that the remark, "Let us go and pitch some horseshoes," could "have been directed" at him, but he admitted that he did not go to Sheets' home by invitation, also stating that he does not recall whether the statement was in fact made to him. The sum of the matter is that I find Murray's explanation of his visit to Sheets' home to be unconvincing, and I credit Sheets' version of the incident at his home.

Although Murray asserted that he received no instructions from any of his superiors to call at Sheets' home, it may be borne in mind that his attempted surveillance of what he believed was to be a union meeting was closely related in time to other unfair labor practices, to be described later, and the inference is warranted that Murray's visit was part of a pattern by the Respondent of countering or discouraging union activity among its non-mechanical employees. In any event, whether or not Murray acted under instructions from any superior, the fact is that he was a supervisor and represented management in the eyes of the employees, and his conduct is thus imputable to the Respondent. The fact that no union meeting was actually in progress does not affect the conclusion that Murray's attempt to engage in surveillance violated the Act. The attempted surveillance and Murray's statement to Sheets of the purpose of his visit contravened Section 8(a) (1) of the Act.

Sheets also testified that on one occasion Smith telephoned him at one of the community offices and told him that "he had learned of a movement to organize a Guild in the Herald American, and that he would rather close his papers down than sign up with the Guild." Sheets stated that he could not recall the date of the call or whether it occurred before or after London's discharge, but he estimated that the call was made "probably (in) June or July." Smith denied making the statement, asserting: "No such conversation occurred. It would have

been ridiculous on my part to make any statement at all to Mr. Sheets. It did not concern his department." Smith also stated that he "hardly knew Mr. Sheets by sight" at the time in question. Whether Smith "hardly knew" Sheets by sight is not decisive, although it may be noted that Smith's title was then, as it is now, division editor, and that he was then, as he is now, the second highest paid among the non-supervisory editorial employees. Nor may one find guidance to the facts in Smith's inaccurate statement that the Guild's organizational activities "did not concern" the editorial department. As in the case of Sheets' description of Murray's visit, no reason appears why Sheets should fabricate a story contrary to his employer's interest. He is a disinterested witness; Smith is not, and, as pointed out earlier, other portions of Smith's testimony reflect a substantial number of infirmities. These militate against acceptance of his denial that he made the statement Sheets attributes to him. I credit Sheets.

The evidence of Smith's statement is undoubtedly relevant to the question of the Respondent's attitude toward organization activities by its employees, and as background for an appraisal of its motivation for the discharges. The question arises whether a finding should be made that Smith's statement violated Section 8(a) (1) of the Act. I do not make such a finding for reasons set out below. The complaint in effect alleges that the acts of interference, restraint and coercion consist of specific

statements or conduct by named supervisors. Smith's statement to Sheets is not alleged. I do not hold that a finding of violation of Section 8(a) (1) can be made only if the conduct in question is specifically detailed in the complaint and attributed there to a named individual. What I do hold is that there should be some appropriate allegation to support the finding. This appears to be subject to some exception (to be described below) which may be spelled out from a number of cases. But to lose sight of the function of a complaint as staking out the boundaries of the issues, and as the instrument for informing a respondent of the charges made against him, is to invite an attrition of procedural machinery designed by the law to promote fair play and clarity in statement of the issues.

The exception noted above is suggested by cases holding in effect that a finding of violation of the Act is appropriate, although the conduct in question is not alleged in the complaint, if the issue leading to the finding was "fully litigated at the hearing" (Olin Industries, Inc., 86 NLRB 203, 206, n. 10, enforced 191 F. 2d 613 (C.A. 5), cert. den. 343 U. S. 919).[23] However, I do not read these cases as requiring a finding that Smith's statement violated the Act. The disputed factual issue of whether

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[23]See, also, American Newspaper Publishers v. N. L. R. B., 193 F. 2d 782 (C. A. 7), aff'd 345 U. S. 100; United Biscuit Company of America, 101 NLRB 1552, 1568, n. 27, enforced 208 F. 2d 52 (C. A. 8), cert. den. 347 U. S. 934.

he made the statement was "fully litigated" in the sense that both sides adduced relevant evidence bearing on the subject. As pointed out earlier, the statement imputed to Smith bears on issues raised by the pleadings. But that does not mean that the evidence adduced with respect to the disputed factual point raised an issue, in turn, whether Smith's statement constituted a separate violation. Such an issue was not raised, and, therefore, could not have been "fully litigated," for the simple reason that the Respondent has nowhere been put on notice, whether in the complaint or otherwise, that Smith's statement, relevant though it may be to various issues presented by the pleadings, is also subject to a finding that it was of itself violative of the Act.

Hickey and Farley, who were employed in the Bellflower office prior to their discharge, impute statements of a coercive nature to Lugoff. Hickey worked under Lugoff's supervision. According to Hickey and Farley, the statements were made on one occasion during the first half of July, 1954, in the course of a conversation between Lugoff and Hickey in the Bellflower office. Hickey's version, under direct examination, was that Lugoff asked her if she had any connection with the Guild; that she replied that she had none; that he then said that he hoped she had no connection with the organization because employees connected with it would be dismissed immediately; that he then stated that he knew that there were Guild activities going on, "possibly centered in the North Long Beach and

Bellflower offices," and that Smith had told him "to find out who was responsible" and to discharge all those in the Classified Department if necessary. Under cross-examination, Hickey gave substantially the same version, except that she omitted any reference to Smith's alleged instructions to Lugoff. Farley's account of the conversation is less detailed. She stated in effect that she did not hear all of the discussion because she was attending to some duties, and that she "didn't pay too much attention" to it. Her description of the interrogation of Hickey by Lugoff is that he asked Hickey "did she know anything about it, and who was involved." Farley, also stated, in substance, that she heard Lugoff say that he was glad that Hickey was not involved, and that Smith was going to discharge all those in the Classified Department if he did not find out who was involved in the union activities. Lugoff testified that Smith did not give him any instructions to discharge anyone "because of union activities," and in effect denied that he made the remarks imputed to him.

In resolving the credibility issue, I have given consideration to variances between the Hickey and Farley accounts, and to differences between Hickey's initial version and the one she gave under cross-examination. These factors are not decisive. The testimony of the two women deals with details of a conversation that occurred, according to their account, about five months earlier. Indeed it would be strange, and perhaps a reflection on their credi-

bility, if they were in complete accord on all details of the incident. Upon observation of both, I formed the opinion that they endeavored to give their best recollection and my impression was that they were both forthright witnesses. Moreover, although they differ in details, they are broadly in accord with respect to two significant features: (1) that Lugoff interrogated Hickey on the subject of union activities; and (2) that in substantial effect, if not in precise terms, Lugoff imputed an intention to Smith of finding out who was responsible for union activities, and of discharging all employees in the Classified Department if that were necessary to eliminate union sentiment there. This is reminiscent of Smith's statement, quoted by Sheets, that he "would rather close his papers down than sign up with the Guild." The testimony of Sheets, a distinterested witness, contributes corroborative weight to that of Hickey and Farley. Moreover, as indicated by the testimony of Hickey and Farley, there is good reason to conclude from evidence of a conversation between Ross and Butler on July 12, 1954, that the Respondent was in fact endeavoring to find out which of its employees were engaged in union activities. The conversation will be described in detail later in connection with Ross' discharge, but one may note here that on the occasion in question Butler sought to find out from Ross if the latter had any connection with the Guild. Lugoff's interrogation of Hickey, it seems to me, was cut from the same cloth. Finally, as will appear later, Lugoff gave some implausible testi-

mony on the subject of Hickey's discharge, and this weighs against acceptance of his denial that he made the remarks attributed to him by Hickey.

I find that on the occasion in question, he asked Hickey whether she was connected with the Guild; stated that employees so affiliated would be dismissed immediately; and, in substance, quoted Smith as telling him to find out who was responsible for union activities in the Classified Department, and to discharge all employees in the department if that were necessary to eliminate any sentiment there for unionization. As a consequence of such interrogation and statements by Lugoff, the Respondent violated Section 8 (a) (1) of the Act.[24]

On July 18, 1954, the Respondent increased the weekly wages of all but two of the non-supervisory employees on its editorial staff.[25] In all, the wages of 12 employees were raised. The increases were not uniform, some amounting to $5, others to $10, and several to $15, per week.

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[24]That conclusion is not affected by Smith's denial that he ever ordered anyone "to fire any employee for union activities." The fact is, as will appear, that employees were discharged for such activities. In any event, notwithstanding Smith's denial, Lugoff's statements to Hickey are imputable to the Respondent.

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[25]As nearly as can be determined from the evidence, those who did not receive increases on that date were Donald Desfors and Marion Mattison. The latter's weekly wages were raised by $10 some 10 days before the general increase.

Both Smith and Butler described the Respondent's purported reasons for the increases. Smith testified that he became aware in or about March, 1954, that the economic condition of the newspaper was deteriorating; that he held a meeting of department heads in March and told them that the newspaper was "losing considerable money," and that they should "cut down" on expenses as much as they could; that at the meeting discussions were also held concerning "more efficiency in the job," prospects for "additional business," and the "possibility of trying to raise rates"; that prior thereto, he had felt that wages of editorial personnel had lagged behind those of employees in other departments, and that he and Brewer had discussed that matter prior to March; that in that month (or in April), subsequent to the supervisors' meeting described above, taking a "more active interest" than previously, he brought the matter of wage scales up "rather forcibly" at a meeting with Brewer and Butler, telling them that he "didn't want cheap people" and "would rather have one high priced man than three cheap ones"; that Butler expressed his belief that the Herald American was "paying more than other newspapers in the neighborhood"; that at that time, he (Smith) "wasn't engaged actively in handling the paper and * * * didn't want to step in and take over arbitrarily"; that he raised the question of wages again later and "insisted on a survey" of wage rates paid by such newspapers; and that in June or July Butler reported the re-

sults of such a survey to the effect that the other newspapers "were either paying about the same prices that we were or less." (At one point in his testimony, Smith stated that he requested the survey in July or August. Elsewhere he testified that the survey results were reported to him in June or July. The increases, as noted earlier, went into effect on July 18.)

Putting an evaluation of Smith's testimony aside for the time being, it is difficult to determine from Butler's testimony when definitive discussions were held between him and Smith on the subject of increases for the editorial employees. Stating (in some contrast to Smith) "I think there was a little conversation about wages—it didn't amount to much—around March," Butler testified that he and Smith had discussed the subject over a period of four or five months preceding the increases; that "at least as early as May, perhaps earlier," Smith took the position that wages of editorial employees should be increased; and that he (Butler) replied that he hoped that the Respondent's financial position would warrant the increases in the fall, but that he was fearful that it would be difficult to publish the newspaper "if we had to pay more and then cut down on the number of people." At another point in his testimony, Butler agreed to a suggestion that the "first significant conversation which eventually resulted in the wage increase" took place in May, but when asked to describe what was said, he replied, "That is difficult to remember

because we had several conversations." Later, agreeing that he had a "specific conversation" (with Smith) relating to the increases, he testified that it "would be very difficult to say" when it occurred. Additional questioning on the subject of such a conversation brought the reply, "I am not sure of my recollection, but if I were trying to place it, I would say it was probably in June." On that occasion, according to Butler, Smith told him that the wages of the editorial employees "should be higher," and he replied that perhaps Smith "was right and that I would look into it and bring a report back to him as to what I thought it should be." Butler stated that he made a survey and reported orally to Smith "somewhere around the middle of July" that Smith "was correct, that we needed some wage increases."

According to Butler, his survey took the form of inquiries concerning wages paid by four nearby newspapers—one in Bellflower, another in Norwalk, a third in Huntington Park, and the fourth in Downey. He stated that he could not recall the name of the Downey newspaper, and that his information concerning wages paid by the Bellflower newspaper came from an interview he had with a former employee of the paper, but testified, "Now, whether that (the interview) was at that time or not, I am not positive." From the interview, Butler stated, he gathered that the Bellflower paper paid "between $5.00 and $10.00 a week higher" than the Herald American. Concerning his inquiry about

the Huntington Park paper, he testified: "I believe I looked it up, as far as I could find, the record of what was being paid in Huntington Park and I remember discussions (sic) wages with one of the reporters of the Huntington Park papers, who came in to see me." Butler described the information from the reporter as "a little bit uncertain." As nearly as he "could understand it," Butler stated, he learned that the rate for beginners was lower on the Huntington Park paper than for comparable personnel on the Herald American, but that the former's wage rates "for the long-time people would be a bit higher." Butler did not describe the form his inquiries took with respect to the Norwalk and Downey papers, but he stated that wages on the former were about $5.00 to $10.00 higher than those paid editorial employees by the Herald American.

A number of factors support the General Counsel's claim concerning the wage increases. Of these, the timing stands out in significance. I have no doubt that in the month of July, the Respondent was considerably concerned over union activities by or on behalf of the Guild. Evidence of this may be found in Smith's statement to Sheets; Butler's interrogation of Ross on July 12; Lugoff's conversation with Hickey during the first half of July; and Murray's visit to Sheets' home about July 17 or 18. There is good reason to believe that by July 17, the date of London's discharge, the Respondent suspected that the editorial department was a center of union activities in the person of London. He was

employed in the North Long Beach office, and in that connection, it will be recalled that some days before London's discharge, Lugoff told Hickey that Guild activities were "possibly centered in the North Long Beach and Bellflower offices." The circumstances of London's discharge will be discussed later, but the conclusion may be noted here, supported by reasons to be set out in another section of this report, that he was discharged for union activities on July 17. The wage increases were put into effect on the following day.

The conclusion that this was no mere coincidence is bolstered by factors in the testimony of Smith and Butler, as well as the quality of evidence they gave. According to Smith, the Respondent was not only "losing considerable money" early in the year, but its "profit and loss figures for the year * * * were very bad" in mid-summer, showing a loss of about $5400 by the middle of August. Yet at about the very time when the financial condition was allegedly "very bad," the Respondent gave increases totalling $125 per week, increasing its financial outlay at the rate of $6500 per year. There is no evidence that any employees had requested that their wages be raised, and in the absence of such evidence, it is pertinent to inquire why the Respondent should select the time, of all others, when it is claimed that the "profit and loss figures * * * were very bad," to raise the wages of all but two of the Respondent's non-supervisory editorial employees. To be sure, there are generalizations in the testi-

mony of both Smith and Butler to the effect that it was Smith's policy to effect efficiency and economy by paying higher wages to a reduced staff, but if that is so, it seems strange indeed that the policy was not put into effect in March when the newspaper was, according to Smith, "losing considerable money," but was deferred until a period, months later, when the Respondent was manifestly concerned over sentiment among its employees for the Guild. Smith endeavored to explain away the delay by stating that he was not "engaged actively in handling the paper" in March, and "didn't want to step in and take over arbitrarily which I did do in July and August." In the light of my impression of Smith, the explanation has a tenuous cast. During his testimony, he was emphatic and positive in demeanor and assertion, impressing me as an individual who is disposed to seek domination over a situation with which he is concerned. He had complete control over the newspaper in March, notwithstanding his claimed abstention from active direction of its affairs, when, as he asserts, he raised the wage question "rather forcibly" with Brewer and Butler, and one may well entertain a substantial doubt that the alleged delay was merely the product of his forebearance. As against the subjective claim of such forebearance advanced now, there is the objective fact that the increases were granted to editorial employees in a setting of unfair labor practices, following by one day the discharge of London, an editorial employee, because of his union

activities. I think that the objective facts are a sounder guide to an appraisal of the Respondent's motivation for the increases than the claim that they were delayed because Smith did not wish previously to intrude himself "arbitrarily" into effectuation of management policy. Moreover, it is difficult to see why it would be arbitrary for an individual having complete control over an enterprise, which is manifestly his in fact if not in form, to require his subordinates to put a given policy into effect which he believes to be right as a good business practice.

There is an additional, and important, reason for questioning the Respondent's claim that the increases were disassociated from the union sentiment among the employees. Implicit in Butler's testimony, at least, is the claim that the increases were given to bring the wages of editorial employees into line with those paid by neighboring newspapers. The results of the alleged survey, as Butler described them, would indicate that he learned that editorial personnel of two of the papers paid higher wages than the Respondent, and that wages paid by a third were higher for some employees and lower for others. (Butler did not specify what he learned with respect to the fourth newspaper allegedly surveyed.) Also implicit in Butler's testimony is a claim that he reported his findings to Smith. Yet, in contrast to the alleged findings, it is a striking fact that Smith testified that Butler reported "that they (the other papers) were paying about the same

prices or less" (emphasis supplied). The discrepancy is such that it leads to a substantial doubt, to say the least, either that the survey was made or that Butler made a report to Smith. I find myself unable to view either the alleged survey or the report as a reliable basis for findings.

Finally, before setting down a definitive conclusion concerning the increases, some comment on the quality of Butler's testimony is appropriate not only as a basis for evaluating the motive for the increases, but because such an evaluation has a bearing on the evidence pertaining to London's discharge, which will be discussed later. A pattern of evasiveness runs through Butler's testimony. He gave his evidence with cautious demeanor, but I concluded that the caution was the product of an intention to avoid committing himself rather than of a desire to testify accurately in areas where the Respondent's interest could be adversely affected. Even with respect to so basic and undisputed a matter as the fact that the increases were granted —a fact obviously within his personal knowledge— when asked whether increases were granted to editorial employees in July, 1954, he replied, with cautious demeanor: "Yes, my understanding is there were, yes" (emphasis supplied). He seemed careful to avoid commitment when efforts were made during his examination to determine concretely when the question of granting the increases first began to take crystalized form—an important question if one bears in mind the setting in which the

wages were raised. The pattern of evasiveness was quite pronounced when inquiry focused on details of his alleged survey. He professed a loss of recollection as to the name of the Downey newspaper, although he has worked in the area for many years, and little more appears in his description of his inquiries than that he spoke to an employee of one paper and to a former employee of another—a somewhat casual approach to the survey which Smith claims he "insisted" upon. The type of caution described above was manifested in his references to the information he claims he received from the former employee. In that connection, he testified: "I believe I talked to a former employee if I remember correctly. I am not certain, however * * *. The thing I am not quite clear on—at one time I heard that the society editor on the Herald Enterprise (a neighboring newspaper in Bellflower) was disengaged and I interviewed her about wages. Now, whether that was at that time or not, I am not positive." Thus his testimony even leaves open the question whether the alleged conversation with the former employee of the Herald Enterprise was part of his alleged survey, and if the survey was made, one may ask whether it consisted of anything more than a chat with an unidentified reporter for a Huntington Park paper, who, according to Butler, gave him information that was "a little bit uncertain." Butler's testimony offers no safe guide to an answer to the question. It is unnecessary to pursue other details of Butler's testimony, for what has been said sufficiently exempli-

fies my conclusion that he was not a forthright witness.

The sum of the matter is that the testimony of Smith and Butler, and its quality, contribute to the conclusion that the wage increases were timed to act as a deterrent to organizational activities among the Respondent's employees, thus interfering with rights guaranteed the employees by Section 7 of the Act. I find that by putting the wage increases into effect the Respondent violated Section 8 (a) (1) of the Act.

C. London's Discharge.

London entered the Respondent's employ as a reporter in July, 1950. His salary at that time was $50 per week. He was employed in the Compton office until July, 1953, when he was transferred to the North Long Beach office, remaining at the latter place until his discharge on July 17, 1954. He was the only editorial employee stationed in the North Long Beach office. The other personnel there consisted of a classified advertising employee, two or three salesmen, and a circulation manager. During London's employment, he received a number of increases, the last of them in March, 1954, when his wages were raised $5 per week. At the time of his discharge his weekly salary was $75.

While employed in Compton, London and other editorial employees stationed there customarily worked until about 7 or 7:30 p.m. each Tuesday and Wednesday. This was necessitated by the fact

that the Thursday issue of the newspaper went to press on Wednesday, which is known as a "make-up" day, that is, a day when the newspaper is made up for printing. Mondays and Thursdays were relatively slack periods for the Compton editorial personnel, and they were given an afternoon off on either one of those two days to compensate for the extra time worked on Tuesdays and Wednesdays. Following that practice, London was given Thursday afternoon off. The Compton office was open each Saturday (which is also a "make-up" day in preparation for the Sunday issue). While in Compton, London worked a full day on Saturdays.

After his transfer to North Long Beach, London customarily worked late on Tuesday nights, spending a varying number of hours at the Compton office, sometimes until midnight or later. The time there was devoted to preparing and turning in copy and in "make-up" work. For some time after his transfer, it was London's practice to come to the Compton office from North Long Beach about 6:30 p.m. and spend the remaining late work hours in Compton. At one point or another, he altered this practice to the extent that he usually came to Compton about 10 or 11 p.m. for the purpose of turning in his copy and performing related "make-up" work, remaining at the Compton office for varying periods of time, sometimes finishing his work as early as about 10 p.m. and at other times at midnight or later. On about six or seven

occasions during his year at North Long Beach, he left "the office" (whether North Long Beach or Compton is not made clear in the record) at about 8 p.m. on Tuesday, worked at home after that hour typing stories, and brought the copy to the Compton office on the following morning.

The North Long Beach office was closed on Saturdays, and London did not work there on those days. He nevertheless worked Saturday mornings, proceeding directly to the Compton office to turn in copy and perform "make-up" work, and usually arriving there at about 6:30 a.m.[26] On such days, he usually finished his work before noon (sometimes, the record indicates, by or before 11 a.m.), depending "on conditions in the back shop" (presumably meaning conditions in the press shop). He did not work on Saturday afternoons while attached to the North Long Beach office. While stationed there, he took Thursday afternoons off, commencing to do so shortly after his transfer and continuing the practice until his discharge. (The question whether he had permission to do so will be considered at a later point.)

London began to engage in organizational activity among the Respondent's employees on behalf of

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[26]London testified that on Saturdays he "usually got there (Compton) at 6:30," without specifying "a.m." or "p.m." From the context of his testimony as a whole, it is evident that he meant that he usually arrived in Compton on Saturdays at 6:30 a.m.

the Guild about the end of April or early in May, 1954, soliciting memberships for the Guild, and securing some signatures on applications for membership. That he was active in July is evidenced by the fact that he solicited Cleland to join the Guild on July 10, pointing out what he regarded as advantages of unionization, and giving Cleland an application card. [27]

There is no doubt that Butler was aware that London engaged in union activities. Butler himself

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[27]London gave a detailed (and undisputed) account of the conversation. Reference need be made to only some of its aspects. On the occasion in question, before London revealed that he was active on behalf of the Guild, Cleland asked him whether he knew anything about a "Guild drive" at the paper. The General Counsel apparently seeks a finding that Cleland's inquiry violated Section 8 (a) (1). As stated earlier, the evidence does not establish that Cleland was a supervisor within the meaning of the Act. It need not be decided whether the finding sought may be based on the fact that Cleland exercised some authority over others, and that when London was hired he was told by Butler that he "would be working under" Cleland. A finding that Cleland's inquiry violated the Act would neither add to, nor detract from, the remedy to be recommended below. The evidence will not support a holding, apparently also sought by the General Counsel, that Cleland informed the Respondent of London's organizational activities, and I make no such finding. Nor do I base findings of unfair labor practices made herein on the theory that any statements by Cleland are imputable to the Respondent. However, the conversation between London and Cleland is admissible as establishing the fact of London's organizational activities during a period relevant to issues in this proceeding.

conceded as much, although putting it in this fashion: "I had only a vague report which was only indirectly that he had been spending working time down there, soliciting membership for the union." Then he stated, "I believe it was Mr. Brewer (who gave him the report) but it was indirect." In any event, it is evident from the whole record, including the testimony (to be described later) of Oney A. Fleener, one of the Respondent's employees, that Butler knew at the time he discharged London that the latter had engaged in organizational activities on behalf of the Guild.

Butler discharged London shortly after the latter had completed his "make-up" work in Compton on Saturday, July 17. The managing editor denied that he dismissed London because the latter engaged in union activities. Butler testified that he had once warned London "about leaving early on Thursday"; and that thereafter, he had come to the North Long Beach office shortly before noon on a Thursday (about a week before the dismissal, according to Butler's estimate), had found London absent, and had been informed by others in the office that London had gone for the day. The sense of Butler's testimony, taken as a whole, is that he discharged London because the latter took the afternoon off on the Thursday in question in disregard of a previous warning not to follow that practice. The alleged justification does not stand up under scrutiny in the light of factors set out below.

London testified that in or about August or September, 1953, he told Butler that he "had been taking off on Thursday afternoons" because he "had been working late on Tuesday nights"; and that Butler replied, "I know that as well as you and as long as you turn in your copy, that is all we require." Butler's testimony contains no express denial of the quoted statements. But quite apart from that circumstance, there are factors which render plausible London's assertion that Butler knew and approved the former's practice.

As Butler himself put it, he "recognized the right of the employee, if he had some duties that were out of working hours, he might go home a little earlier." Although Butler also asserted that such a practice is different from London's custom, the fact is that there appears to have been a policy, in general, under which editorial employees took compensatory leave for extra working hours. This conclusion finds additional support in the undisputed evidence that editorial personnel in the Compton office were given an afternoon off on Mondays and Thursdays to compensate for evening work on Tuesdays and Wednesdays. As London worked late on Tuesday nights, while stationed in North Long Beach, it is not implausible that Butler should recognize that it was equitable for London to take compensatory time off each Thursday afternoon, even if London, in contrast to his practice while stationed in Compton, was not required to work on Saturday afternoon.

More to the point, it may be borne in mind that London followed the practice of taking Thursday afternoons off substantially throughout the entire year that he was stationed in North Long Beach; and that Butler, in the course of his duties, customarily visited that office on Thursdays at varying times between 10:30 a.m. and 2 p.m. Yet Butler, here also manifesting the vagueness which characterizes so much of his testimony, stated that "it was quite some time" after London's transfer that he became aware that London was not at work on a Thursday afternoon; that he could not recall when that was; that he "couldn't swear" whether it was in 1953 or 1954; and, finally, that it was "probably" in the spring of 1954 that he first became aware of the matter. Bearing in mind that Butler called at the office each week on the very day that London absented himself, I think it improbable that Butler would not become aware of London's practice much sooner than the managing editor's testimony suggests. Moreover, Butler's claim that he warned London about the practice is also cloaked in vagueness. The managing editor testified that "at least four or five times," when he called at the office, he noticed that London was absent in the afternoon; that on one or two occasions, he inquired of others in the office as to London's whereabouts, and was told that the employee had gone for the day; that as a result of the latter's absences, he became "suspicious of what (London) was doing"; and that he warned London about the practice. As to the terms of the alleged warning, Butler stated that his

"memory of the conversation is very vague as to what actually was said," but he nevertheless testified that he called London's attention to the fact that he had Saturday afternoons off; and that he told London that "we were supposed to be on the job five and a half days in the week," and that "he (London) should not be leaving early on Thursday any more." Asked to fix the time of the alleged warning in relation to the last occasion when he states that he found that London had gone for the day, Butler stated, "If I were guessing, I would say it would be between one and two months, but I couldn't swear to it," and followed this with a statements that his "recollection is very vague on the point." Thus, according to the estimated time of the alleged warning, if one may term Butler's guess an estimate, one is in effect asked to believe that London was able to take each Thursday afternoon off, without permission, for almost an entire year before Butler got around to warning him to stop the practice. A reasonable regard for probability militates against such a belief. Moreover, as will appear, at the time of the discharge, Butler said nothing about London's practice of taking Thursday afternoons off, and this contributes support to the conclusion that Butler was aware of, and had approved, London's absences. In sum, I conclude that London's account of his conversation with Butler in or about August or September, 1953, is credible; that henceforth London took such afternoons off with Butler's knowledge and permis-

sion; and that Butler did not thereafter warn him to stop the practice.

What is more, there are additional indications in the record, stemming from undisputed testimony, that the justification for the discharge now put forward by Butler is no more than an afterthought. As a preface to what follows, it may be borne in mind that London worked for the Respondent for about four years; and that during that period he received increases totalling 50% of his starting salary, the last increase being given to him only a few months before his dismissal. When Butler discharged London, the latter asked for an explanation, stating that he did not think it right that he should be discharged "without notice or explanation." Butler replied, "I cannot tell you why," and when London continued to press for an explanation, Butler stated, "All I can say is that you thought more about other things than you did of the paper." London stated that he was not "satisfied with that," to which Butler replied that if London wanted anything else, he would have to see Smith. London asserted that he would do so and left. (London's account of this conversation with Butler is undisputed. When Butler was asked during his examination whether he recalled what he said to London, he replied, "Not clearly, no, I don't think so.") Shortly thereafter, that same day, London went to Smith's home and talked to the publisher. Butler was present. London asked Smith for an explanation for the dismissal, and the latter replied that

the reason was that he had not been satisfied with London's "political reporting." Then, when requested by London to specify "what reporting," Smith answered, "Oh, well, just generally speaking." Thereupon London asked Butler why that had not been mentioned to him during the past two weeks, and Butler answered that "there had been a general deterioration." In response to a complaint by London that he had been dismissed "without notice, after working on the paper for four years," Smith stated that he would give London "two weeks' pay instead of notice." London left after some additional conversation during which he remarked that both he and Smith knew the "real reason" for the discharge, to which Smith replied, "Well, what is it then?" (London testified that he could not recall what answer he gave to that.)[28]

It will be observed that at no point was London told either by Smith or Butler that he was dismissed because he had taken time off without permission. The sense of Butler's testimony is that

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[28]London's account of the conversation at Smith's home is essentially undisputed. Butler gave no version of the discussion, and about all that appears in Smith's testimony on the subject is a denial that London told him that he had been "discharged for union activities" or that the employee asked whether these had been "the cause of the discharge." The important point to bear in mind is that it is undisputed that Smith told London that the latter's "political reporting" was the cause of the discharge, for this differs from the reason given by Butler in his testimony.

that was the reason for the dismissal; yet Smith told London that the cause was the latter's "political reporting." Why, it may be asked, this disparity? This shifting about of reasons bespeaks a search for a pretext to justify the dismissal and to conceal its real motivation. It is also well to recall that when London initially asked Butler for a reason for the discharge, the latter replied, "I cannot tell you why," and later referred London to Smith, thus in effect telling London that he (Butler) had been forbidden to give London the reason. Now, why should Butler follow such a course unless it was the Respondent's purpose to hide from London the real basis for his dismissal? I am impelled to the conclusion not only, as found above, that London had Butler's permission to take Thursday afternoons off, but that the justification advanced by Butler for the dismissal is no more than an afterthought.

One of the Respondent's employees, Oney A. Fleener, had a conversation with Butler about an hour after London's discharge. Fleener and Butler gave differing versions of their talk. According to Fleener, he remarked to Butler that London had told him that he had been discharged because he belonged to the Guild. Describing Butler's reply, Fleener testified: "Mr. Butler said he (London) was discharged because he was working for the union instead of working for the newspaper. That is as near as I can remember although it isn't the exact quotes." From other testimony Fleener gave,

it appears that he construed Butler's statement as meaning that London had been neglecting his duties by devoting time when he should have been working to organizational activities. (The question at issue here, however, is not the interpretation that Fleener placed on Butler's remarks but what Butler said.) Butler's version of the conversation is that Fleener asked him whether London had been dismissed and if the "union (had) anything to do with it"; that he replied, "Well, no, not as to the dismissal"; that Fleener then asked whether London was "mixed up with the union"; and that he (Butler) said, "I don't know anything about it other than I had some reports that he was soliciting membership in the office during the time that he should have been working."

Fleener appeared to me to be, like Sheets, a disinterested witness. While he initially reflected a disposition to interpret Butler's remarks, rather than to quote Butler, when the matter was brought into focus by a request that he state what Butler had said, Fleener gave what is, in my judgment, his best objective recollection of Butler's language. In contrast, Butler's testimony, taken as a whole, reflects a substantial amount of evasiveness. Apart from my appraisal of both witnesses, upon close examination, what Butler told London only about an hour earlier tends to support Fleener. It will be recalled that Butler told London: "All I can say is that you thought more of other things than you thought of the newspaper." Although couched in

obscure terms, it is evident that what Butler meant was that London thought more of union activities ("other things") than he thought of the newspaper. Such an attitude is closely kindred in spirit to a statement that London "was discharged because he was working for the union instead of working for the newspaper." In the light of my impression of Fleener, and against the background of the whole record, including the evasive content of significant portions of Butler's testimony, I find that Butler made a statement to Fleener to that effect.[29]

If one looks at the record in the whole, the true motivation for London's discharge appears. Butler's statement to Fleener supports the conclusion

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[29]From the tenor of the Respondent's cross-examination of London, I gather an implication by it that London was discharged because he solicited the membership of other employees in the Guild during working time. It is unnecessary to canvas details of London's cross-examination, but several matters may be noted. First, the evidence does not establish that London neglected his duties for organizational work. Second, the Respondent had no rule prohibiting discussion by its employees of union matters during working time. Employees engaged in "social talk" during business hours, and it is obvious that the Respondent did not prohibit such conversations. Plainly, in that setting, it would be discriminatory to penalize London merely for solicitation of memberships during working time. Third, for the Respondent to claim that London was discharged because he devoted working time to organizational activities would be but another shift in its position concerning the reason for the

that London was discharged because of his adherence to the Guild and his union activities. But there is far more than that in the record to guide one to decision. From the tenor of Lugoff's statements to Hickey within a period of about two weeks prior to the discharge, it is evident that the Respondent suspected that the North Long Beach office, London's place of employment, was a center of union activity, and that the Respondent was seeking to identify any employee so engaged and to dismiss him. The fact that London was discharged so soon after this expression of the Respondent's attitude and intention is no mere coincidence. Supporting this conclusion is not only Butler's remark to Fleener, but his statement to London only about an hour earlier that London was being dismissed be-

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dismissal. Butler advanced no such claim. On the contrary, he testified in effect that he told Fleener that London's discharge was unrelated to the latter's union activity. Moreover, it is undisputed that Smith told London that the dismissal was based on the quality of the employee's "political reporting." The Respondent also makes the point that it had a rule prohibiting use of its telephone by employees for personal business, and that London, who testified that he was unaware of the rule, used the telephone on a number of occasions to make appointments with other employees in relation to organizational activities. If the Respondent now contends that London was discharged for violation of the rule, that, too, is a shifting position, and reflects on the reliability of the claim that London was discharged for lawful cause. If anything is clear, it is that London was not discharged for unauthorized use of the telephone.

cause he "thought more about other things than * * * of the paper." Standing alone, this statement is obscure, but in the light of the whole record, I am unable to view it as anything more than a veiled allusion to London's union activities and to the fact that he was being discharged because of them. What is more, strong indicia (perhaps the weightiest) of the real motivation for the discharge are to be found in the very fact that the Respondent has endeavored to conceal it. This policy of concealment is clear in the light of the evidence that Butler refused to give London an explanation for the disharge, instead referring him to Smith; that Smith then told London his dismissal was due to the quality of his "political reporting"; and that Butler gave a different reason in his testimony, which, I am convinced, is now advanced post hoc, ergo propter hoc as a pretext for the dismissal. These tangled justifications, the one given by Smith to London, and the other by Butler at the hearing, compel the conclusion not only that the Respondent has cloaked the real motivation for the dismissal, but that the reason was London's adherence to the Guild and his participation in organizational activities on its behalf. Thus I find that in discharging London, the Respondent violated Sections 8 (a) (1) and 8 (a) (3) of the Act. I also find that Butler's statement to Fleener violated Section 8 (a) (1) of the Act.[30]

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[30]This conclusion is unaffected by the fact that Fleener construed Butler's statement as meaning that he had discharged London because the latter

D. The Discharge of Ross, Hickey and Farley.

Ross entered the Respondent's employ as city editor of the Lakewood edition on or about March 22, 1954. Butler was his supervisor.

On July 12, 1954, Butler and Ross attended a meeting of the Chamber of Commerce in Lakewood. Shortly after they left the meeting, upon their return to the parking lot where they had left their respective cars, Butler engaged Ross in conversation about the Guild. Ross had applied for membership in the organization toward the end of April or the beginning of May, but he had not as yet been notified of his acceptance at the time Butler spoke to him. On the occasion in question, Butler said to Ross: "I hope you haven't been sucked into this Guild, have you." Ross asked Butler, "Guild—what do you mean?" Butler replied that "it was a newspaper Guild," took a Guild membership application from his pocket, showed it to Ross, and said, "One of my boys was approached with this and of

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had neglected his duties to engage in union activities. Even if one ignores the whole record, one may reasonably construe Butler's statement as meaning that London was dismissed because he was more devoted to the union than to the newspaper. Be that as it may, Fleener's construction is not controlling on the question of the legality of Butler's statement. One should look to the words themselves for an appraisal of their legality. In any event, they do not stand in isolated context, for they follow a pattern of inhibiting expressions by the Respondent's supervisors on the subject of union activities.

course, he brought it to me right away and I just wondered if you had been connected with it." Ross replied, "No, I guess I am too new. I guess they do not trust me." Butler then observed that he had always associated the Guild "with the Leftist movement," and particularly so since a certain individual had appeared on the picket line during a strike at a newspaper in Huntington Park. (Ross' account of the conversation is undisputed.)

Butler's characterization of the Guild as "Leftist" did not, of course, violate the Act, since the managing editor's observation in that regard is protected comment within the meaning of Section 8 (c). This is not true of what was in effect an inquiry by Butler of Ross whether the latter was a member of the Guild. The interrogation should not be viewed in isolated context, for it was part of a pattern of unfair labor practices during the month of July, reflecting a policy, evidenced by the attempted surveillance by Murray and Lugoff's statements to Hickey, of prying into the organizational sentiments of the employees and of endeavoring to identify members of the Guild in order to discharge them. Butler's interrogation of Ross violated Section 8 (a) (1) of the Act.

Tuesday was the busiest day of the week for Ross. His situation in that regard was not significantly different from that of London. It was Ross' custom to carry his copy from the Lakewood to the Compton office at one point or another each Tuesday, and to remain in Compton until his work was completed,

usually between 2:00 a.m. and 4:00 a.m. on Wednesday.

Ross did not wear a jacket to work on Tuesday, August 17, 1954. His upper outer garment was a sport shirt of light buff color. Before he left for business that day he wore a Guild button which was pinned to the upper portion of the pocket located on the left half of the front of his shirt. Judging by a button of the "same design and construction" in evidence, the one Ross wore was about an inch in diameter, bore an insignia and the name "The American Newspaper Guild" in black lettering on a white field. Ross arrived at the Lakewood office at approximately 10:30 a.m. that day and wore the button throughout the day at his work. The Button was not hidden from view. This was the first time that Ross wore a Guild button while at work.

Butler came to the Lakewood office at about 4:00 or 4:30 p.m. on August 17. Ross was busy with some work at the time. Butler stood by for about 10 or 15 minutes and then asked Ross to step into the street. Both men went outside, and there Butler discharged Ross, assigning as the reason that Smith had directed that the payroll be cut for reasons of economy. Indicating the Guild button,[31] Ross re-

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[31]Ross testified that he pointed to his button; according to Butler, Ross "pulled his shirt out so as to show it." As the button was not hidden and was worn in view on the upper left portion of Ross' chest, it does not quite appear why Ross should

plied that both he and Butler knew that he was being dismissed because he was wearing it. Butler repeated that he had been told that an economy drive had gone into effect, and said that Ross could interpret that any way he wished. Ross asked Butler whether he should "finish out the rest of the edition" (which would require him to work that night and the early morning hours of Wednesday), and the managing editor said that that was a matter Ross should discuss with Smith.[32]

Ross telephoned Smith and asked the latter why he was being discharged. Smith replied that an "economy drive" was under way, stemming from his insistence three or four weeks earlier "on a retrenchment"; that three or four persons had been laid off; that he had directed an additional retrenchment; that that was the reason Ross was

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have to pull out his shirt "so as to show" the button. In any event, the subsidiary issue of the manner in which Ross indicated the button need not be resolved, since a resolution either way would not affect the conclusion reached with respect to the legality of the discharge.

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[32]Both Butler and Ross described the conversation. Their versions are not in significant conflict. In resolving several variances, all of a minor nature, I have adopted the version which appears to me to be the more probable. For example, Butler testified that he told Ross to use his own judgment with respect to completion of his work for the day. However, it is undisputed that Ross called Smith and discussed the matter with the latter. This tends to corroborate Ross' testimony that Butler referred him to Smith.

being laid off; that he thought it only fair that Ross "should be let go first" because the latter "was the newest employee in the department"; and that Ross "would be rehired if business warranted it." Ross asked Smith whether he should "finish up that edition," stating that Butler had told him to take the matter up with Smith. The latter told Ross to use his own judgment. Ross finished his tasks, working, as had been his custom, into the early hours of Wednesday morning.

On the following Friday or Saturday Ross was paid for the full week, although he had worked only part of it, and was given an additional week's pay. Ross' salary at the time of his dismissal was $75 per week. He has never been called back to work by the Respondent.

Denying that he discharged Ross because the latter engaged in union activities, Butler testified in substance that he did not notice the union button until Ross directed his attention to it, as described above. Smith denied that he was aware at the time of Ross' discharge that the employee had engaged in union activities. Both Smith and Butler testified in substance that Ross was discharged as part of a program of reducing staff because of economic considerations. As this is the reason in effect given by the Respondent for the discharge of Hickey and Farley, repetition in analysis of evidence will be avoided by setting down some prefatory findings pertaining to Hickey and Farley prior to a discussion of the claim of economic necessity and of the

question of the motivation for the discharge of the three employees.

Hickey entered the Respondent's employ in March, 1954. She worked in classified advertising and was stationed in the Bellflower office. Lugoff was her supervisor. Brewer hired Farley on June 28, 1954. She was employed as a cashier and PBX operator in the Bellflower office. Farley does not appear to have had any immediate supervisor below the rank of Brewer, who at that time was general manager.

Hickey wore a Guild button at work on the afternoon of August 16. Farley also had such a button in her possession but refrained from wearing it on that date. There was a union meeting at Hickey's house that night. Farley attended. The evidence suggests that there was some discussion at the meeting relating to the wearing of Guild buttons, but there is no concrete elaboration of the matter in the record. In any event, on August 17, both Hickey and Farley wore their respective buttons, while at work, throughout the day. They were the only employees in the Bellflower office who did so. The evidence does not establish on what part of her person Hickey wore the button, but it is reasonably inferable from the context of surrounding circumstances that the button was exposed to view. Farley wore her button exposed on her belt.

At about 6 p.m. that day, following her daily custom, Hickey telephoned Lugoff, who was at the

Compton office, in order to report her business volume for the day. Lugoff asked if she would remain at the Bellflower office until he came there, as he wished to talk to her. She replied that she was unable to do so, but offered to come to the Compton office later that night. Lugoff told her not to come, stating that he would see her in the morning.

Lugoff came to the Bellflower office at about 9 a.m. on August 18 and spoke to Hickey who was wearing a Guild button at the time. Farley, who was also wearing a union button, was in the vicinity, hearing only part of the conversation because she had duties which required her attention. Lugoff gave Hickey a paycheck covering her full salary for that week, although she had worked only part of the week, and told her that Smith had "ordered" her discharge as an economy measure. Hickey stated that her discharge was due to the fact that she was wearing a Guild button, and that she was not so "stupid" as to believe the reason given for her dismissal. Lugoff said that he was sorry that he had to discharge her, that her work had been satisfactory as far as he was concerned; that "there wasn't any personal feeling" but "was sorry if (Hickey) was mixed up in the Guild because that (sic) they would not be able to do anything" for her. Hickey expressed the view that she could not be discharged because of "Guild activities," and Lugoff replied that he had "had a situation like that some fifteen years ago" in connection with a Hollywood newspaper, that "nothing ever came of

it," and that "they can't do anything for you." At one point or another while Lugoff was in the office, Farley told him that she was wearing a Guild button, and in effect asked him whether he was going to discharge her also. He replied that he was not her supervisor. After that he asked Farley to give him a line through the switchboard she operated. Hickey heard him mention Murray's name on the telephone, and say, "Come over. I am waiting for you." Murray arrived about 15 or 20 minutes later.[33]

Murray gave Farley a closing paycheck and stated in effect that she was being terminated for economic reasons. She replied that she did not believe that that was the case. Murray then asserted, "If economic measures doesn't hold up, we will go into the efficiency of your work."[34]

In his testimony, Lugoff denied that he discharged Hickey for union activity or that he noticed her union button prior to her dismissal. He asserted that toward the end of the week preceding the discharge, Brewer directed him "to cut down one employee" for reasons of economy; and that he selected Hickey because there had been friction between them. According to Lugoff, the

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[33]Hickey's account of her conversation with Lugoff is undisputed. Much of it is corroborated by Farley. Lugoff gave no version of the discussion.

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[34]Farley's account of her conversation with Murray is undisputed. Murray gave no version of the conversation.

friction stemmed from resentment by Hickey on occasions when he criticized her work.

Brewer testified that it was he who dismissed Farley. He denied that he knew that she was interested in the Guild at the time of the selection, and that her union activity was the cause of her discharge. He stated that her dismissal was part of a reduction in force for reasons of economy, and that Farley was selected because she was junior in point of service to the other PBX operators. Brewer also testified that the reduction in staff had been under discussion by management officials for many months; and that either on August 12 or 13 Smith issued a "flat ultimatum" at a meeting of department heads to reduce staff by at least 12 employees during the following week. (Smith testified that he instructed the department heads to reduce staff by "ten to twelve people.")

Putting aside for the time being the question of the motivation for the dismissal of Ross, Hickey and Farley, the Respondent's claim that there was a reduction in force for economic reasons finds support in undisputed testimony by Brewer that the Respondent laid off six other employees during the week in which Ross, Hickey and Farley were dismissed.[35] On the other hand, the evidence reflects

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[35]In addition to naming the six, Brewer intimated that "a lot of them in the back shop" (employees in mechanical occupations) were laid off, but he stated that he was unable to give their names and his testimony on the subject is quite vague. It does

a number of infirmities in the Respondent's position that all of the employees discharged during the week in question were dismissed solely as the product of an "economy drive."

The Respondent produced no records to show the state of its financial condition at any time in 1954, and its position with respect to the scope and purpose of the staff reduction rests principally on the testimony of Brewer and Smith. According to Brewer, at the meeting of supervisory personnel, Smith left it to each department head to determine how many should be laid off in his department in order to achieve compliance with the directive that the staff be reduced by a "minimum of twelve." (In passing, it may be noted that Brewer could name only nine who were laid off, and that at a later point in his testimony, the "flat ultimatum" to reduce staff by a "minimum of twelve" became "a matter of cutting down nine to twelve in the personnel.") Brewer also testified that at the meeting the department heads had a discussion "as to which departments were to let so many go." He was then asked in effect what decision was reached on the subject of "how many were to be let go in each department," and he replied, "I cannot answer that. The record speaks for itself * * *" When

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not affect the results reached below, but it may be noted that Brewer's allusion to the "back shop" employees is too vague to support a finding that there was a reduction in the number of mechanical employees for economic reasons.

the matter was pressed, he described the decision in this language: "One or more from each department; I will put it this way." At another point, asked whether he knew at the time he left the meeting how many employees, who were under his "direct supervision," he would have to dismiss, he gave no figure, avoiding the question, in my judgment, by saying that all personnel were "indirectly" under his supervision (although he had previously testified that he laid off the individuals over whom he had "direct supervision"). Both in demeanor and in the text of his quoted testimony, Brewer was evasive, leaving a substantial doubt with me that the Respondent's program of reducing staff was what he described it to be. This doubt is compounded by the fact that Brewer's account of the decision to reduce staff does not quite jibe with testimony given by Butler. In contrast to Brewer's description of the alleged directive by Smith to reduce the staff by at least 12 persons, Butler, apparently referring to the same meeting, described the decision reached there as a "general conclusion that we would have to cut the payroll." Asked whether "anything specific" was decided in order to implement the conclusion, Butler testified: "No, I don't recall that there was anything definite. I think Mr. Smith called me later and said, 'Well, we will just have to do something about this.'" This also contrasts with a claim by Brewer that Smith issued a directive at the meeting that each department head reduce his staff by at least one employee. The sense of Butler's testimony is that

it was the telephone call from Smith which crystallized for him the "general conclusion" reached at the meeting, and that it was the call which led to Ross' termination. Brewer's testimony appears to go off in a different direction, for he stated that Butler acted "after he talked to me," testifying, also, "I was the supervisor who made up the list on the instructions of Mr. Smith," thus implying that it was he, Brewer, who decided which employees should be discharged. (At a subsequent point, Brewer stated that he and Butler discussed the names of employees to be laid off, but that Butler "chose the persons.") Significantly, also, although Lugoff is a department head, in referring to directions he received to reduce his staff, he mentioned no instructions by Smith at a meeting. Describing his alleged instructions, Lugoff testified that Brewer told him of an "economy measure" instituted by Smith, and directed him "to cut down one employee." The sum of the matter is that descriptions in the record of the setting for the decision to reduce staff take such different directions that one is unable to reach a definitive conclusion that there was in fact a meeting of department heads at which Smith issued a "flat ultimatum" to reduce the force by a specified number of employees for economic reasons alone, with a direction by Smith to each department head to lay off at least one employee.

Other features of the record contribute substantially to a doubt that the alleged program for staff

reduction was what the Respondent contends it was. Except for an assertion by Smith that "profit and loss figures," which he stated he saw in August, reflected a loss of about $5,400 for the year, the claim of financial necessity rests on generalizations.[36] According to Smith, the Respondent was "losing considerable money" as far back as March, 1954; yet it granted wage increases to almost all the non-supervisory editorial employees to a total of $6,500 per year on July 17, only about a month before Smith allegedly issued the "flat ultimatum." Moreover, in the light of Smith's testimony that the Respondent was losing a great deal of money early in the year, it seems strange that the Respondent did not undertake its alleged "economy drive" much sooner than the middle of August, but, on the contrary, increased its wage bill materially while it was allegedly suffering financial losses. For reasons already stated, Smith's explanation that the wage increases and the staff reduction did not come earlier in the year because he did not participate actively in the business strikes an implausible note. The sense of Smith's testimony is that both the increases and the reduction were the common product of his policy of securing efficiency

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[36]The General Counsel objected to Smith's testimony concerning the $5,400 figure, presumably on the ground that the profit and loss statement is the best evidence of its contents. The objection came late, that is, after Smith had already testified to the figure, and I have permitted the testimony to remain.

by weeding out inefficient employees and paying higher wages to those retained. Yet the evidence falls far short of establishing, at least in any credible fashion, that such a policy was actually followed. For one thing, as already found, the purpose of the wage increases was to discourage union activity. For another, the credible evidence will not support a finding that relative efficiency was a factor in determining which employees should be laid off. Putting the cases of Ross, Hickey and Farley aside, there is no evidence at all that the Respondent took efficiency into account in selecting for layoff the other six employees named by Brewer. If Brewer's account of the meeting is credible, each department head was left to his own devices in deciding how many in his department should be laid off, and upon what basis, as long as he dismissed at least one. So loose a directive strikes one as somewhat odd, for it does not appear to take into account some definite method of co-ordinating the personnel needs of the newspaper or of achieving a specific dollar volume of savings. (For all that appears in the testimony of Smith, Brewer and Butler, there was no discussion at the alleged meeting of any specific amount of money to be saved by the reduction in staff.) Moreover, when Ross spoke to Smith, the latter did not tell the employee that he had been selected on the basis of an appraisal of the relative efficiency of employees. Smith put the selection on the basis of seniority in the department (although it may be noted that another editorial employee, Donald Desfor, whose employ-

ment terminated more than two weeks after Ross was dismissed, had less seniority than Ross). Moreover, notwithstanding Lugoff's claim that he selected Hickey because of friction between them, there is undisputed testimony that Lugoff complimented Hickey on her performance in July, and that when he dismissed her about a month later, he expressed regret for his action, stating that her work had been satisfactory as far as he was concerned. In the face of this uncontroverted evidence, as well as other circumstances to be discussed later, I find unpersuasive the claim advanced by Lugoff now that the quality of Hickey's performance was a factor in her selection. Another circumstance which results in a substantial doubt that the program of reducing staff was what the Respondent claims it was is the fact that two editorial employees were hired soon after the reduction in force. One of these, Don (or Carl) Widener, was hired on September 2, 1954, and the other, Earl Griswold, on October 11, 1954.[37] (Widener's salary was $5 less, and that of Griswold $5 more, than the weekly wage paid Ross.) Moreover, on October 21, 1954, the

[37]According to Smith, he transferred an editorial employee from North Long Beach to another office because of unsatisfactory performance and hired Griswold for the North Long Beach office because Griswold had had considerable experience in working for a competing paper. Be that as it may, the fact is that the hiring of Widener and Griswold serves to weaken the claim that Smith had issued on directive that at least 12 persons be laid off for economic reasons.

Respondent advertised in its newspaper that it had an opening in its Lakewood office for a classified advertising solicitor (Hickey's occupation), setting forth inducements in pay and working hours, and requesting applicants to telephone Lugoff. As there is no substantial evidence that the Respondent's financial condition was significantly better in October than the Respondent claims it was in August, one is led to wonder why the Respondent should seek to employ a classified advertising solicitor so soon after Hickey's discharge if she was in fact dismissed as an economy measure. Smith advanced no claim that the Respondent's financial position had improved to a point where it warranted the hiring of another solicitor. He did offer an explanation but his testimony in that regard took an illuminating turn. He explained that "a girl quit in the (Lakewood) office and we had to replace her." By any reasonable construction this means that a classified advertising solicitor had quit and that the advertisement sought a replacement.[38] Yet the evidence establishes (see G. C. Exh. 6, prepared by the Respondent itself) that Hickey is the only classified advertising solicitor whose employment was terminated after August 1, 1954. I am convinced

[38]This may be compared with Lugoff's claim that after Hickey's discharge, he combined the Lakewood and Bellflower areas for the purposes of soliciting classified advertising, transferring the Lakewood solicitor to Bellflower, from which she served both sections, adding Hickey's former functions to her Lakewood duties.

that Smith became aware at one point of the untenable position in which his testimony had placed him, for when he was asked to give the name of the employee who had quit, he displayed hostility toward the question, protesting that the "question carried a string to it so that there could be no answer." When the matter was pressed, still refraining from giving the name, he conceded, with reluctant demeanor, "that no classified ad girl quit." At a subsequent point, when asked again for the name, he stated that the first name of the girl who had left was Marion. In that connection, it may be noted that the Respondent's records reflect the employment of two persons bearing the first name Marion, one Marion Mattison, an editorial employee, and the other Marion Cronk, a cashier and PBX operator; and that, according to an exhibit (G. C. Exh. 6) prepared by the Respondent itself, neither employee has left the Respondent's employ. Be that as it may, it is testimony such as Smith gave which militates against acceptance of the Respondent's claim that the dismissal of Ross, Hickey and Farley was but part of a program to reduce staff solely for economic reasons.

I think it unnecessary to dwell on other factors in the record which, in my judgment, run counter to a conclusion that the program for staff reduction was all that the Respondent claims. The fact that some employees, in addition to Ross, Hickey and Farley, were laid off during the week in question might warrant a belief that there was some pro-

gram for a staff reduction based on economic reasons, but upon the basis of the record as a whole, particularly in the light of what has been said above and the circumstances surrounding the dismissal of Ross, Hickey and Farley, I am unable to conclude that the program was in all material respects what the Respondent claims. Moreover, even if it be assumed that the Respondent decided, whether at a meeting of department heads or otherwise, to reduce its staff for reasons of economy, that would not be decisive on the issue of the legality of the discharge of Ross, Hickey and Farley, for the question would still remain whether they were selected for the staff reduction because of their union activities.

Turning specifically to the motivation for the Ross discharge, Butler, as in other phases of his testimony, was evasive on the subject of his knowledge of Ross' membership in the Guild. Questioned whether he had such knowledge prior to the discharge, Butler testified: "Well, at that time there were all sorts of rumors floating around. I don't know, other than I heard it some time, previous to that he (Ross) informed me that he not only was not a member of the union but that he had no use for the union and did not want to work under union conditions." What Butler meant by "all sorts of rumors" about Ross' membership in the Guild does not concretely appear, but it was evident to me that his response was guarded and something less than frank, following the pattern, described earlier,

of avoiding commitment to a fact which might bear adversely on the Respondent's interest. I am also persuaded, in the light of all surrounding circumstances, that Butler's denial that he noticed Ross' button before the discharge lacks plausibility. For articles of its type, the button appears to be substantial in size. It was worn by Ross chest-high and fully exposed on a shirt of contrasting color. Obviously, the button was readily visible to Butler during the 10 or 15 minutes he spent in the Lakewood office before he asked Ross to step into the street. Under these circumstances, I think it implausible that Butler would not notice the button before he discharged Ross, particularly if it be borne in mind that Butler had previously interrogated Ross on the subject of the latter's attitude toward the Guild, an inquiry which was manifestly part of a pattern of sensitivity by the Respondent toward participation by its employees in Guild activities.

The sum of the matter is that the discharge of Ross on the very first day he wore the button at work was no mere coincidence. The dismissal has spurred by the fact that Ross wore the button while at work. The discharge came on a Tuesday, and the earmarks of precipitate and hasty action that day was the busiest of the week for Ross, so busy that he customarily worked late into the night, as did other editorial employees, judging from London's similar custom. Why, it may be asked, did the Respondent select a point in the middle of the work week, when Ross was busiest and had not yet

completed his duties in connection with "make-up" day, to discharge the employee? The evidence yields no satisfactory answer to that question, unless it is that the Respondent wished to rid itself speedily of Ross because he had manifested an interest in the Guild. In so doing, the Respondent would be but carrying out the threat that Lugoff had made to Hickey about a month earlier to the effect that participation by an employee in Guild activities "would mean immediate dismissal." The precipitate nature of the discharge, and its underlying reason, are illuminated by some evidence relating to Clark who, it will be recalled, is one of the Respondent's supervisors, and, at the time of Ross' discharge, had a supervisory status, with the title of manager, in the Lakewood office where Ross was stationed, although not Ross' supervisor. About a week or two after Ross' termination, Clark discussed the dismissal with Maxine Galt, who was then, but is no longer, in the Respondent's employ. Clark told Galt that Ross had worn a union button while at work, and then stated that he had telephoned Smith and told the latter that he "would not work with any union member," and that he would quit if Smith did not discharge Ross. (Galt's account of this conversation is undisputed. Clark was not produced as a witness.) In view of Clark's status, I take his remarks to Galt as an admission, imputable to the Respondent, that he did in fact inform Smith of Ross' manifestation of interest in unionization, and threaten to quit unless Smith discharged Ross. As Ross wore the button for only one day, one may

reasonably conclude that Clark called Smith at some point during the day, and told Smith of Ross' interest in unionization, and that this led to Butler's appearance at the Lakewood office toward the end of the day and to Ross' discharge. Viewing the whole record, I find that the Respondent discharged Ross because the latter manifested an interest in the Guild; and that, therefore, the Respondent violated Sections 8(a) (1) and 8 (a) (3) of the Act.

I also find that the Respondent violated Section 8 (a) (1) of the Act as a result of Clark's statement to Galt that he had telephoned Smith and told the latter that he would not work with a union member and would quit if Smith did not discharge Ross.

Hickey and Farley were, like Ross, discharged soon after they appeared at work wearing Guild buttons. But this is not the only common denominator of all three dismissals. Another is that the respective discharges of Hickey and Farley also have the earmarks of precipitate haste. In that connection, at least in the case of Hickey, the content and quality of testimony by Lugoff is revealing.

As described earlier, Hickey was discharged on Wednesday morning, August 18. According to Lugoff's account, he received his instructions from Brewer to reduce staff by one employee either on the preceding Friday or Saturday, August 13 or 14. Lugoff also testified that Brewer gave him a

"deadline" of one week to effect the cut in staff; that he reached a decision to dismiss Hickey "over the week end," that is, prior to Monday, August 16; that he was in the Bellflower office, where Hickey was stationed, on Monday; and that he spoke to her on the telephone on a number of occasions on Tuesday. Thus Lugoff's testimony would make it appear that, having reached a decision to discharge Hickey, he passed over opportunities to do so on Monday and Tuesday, waiting practically two full workdays before he made a move to effect the dismissal at almost 6:00 p.m. on Tuesday; and that it was mere coincidence that the dismissal of both Hickey and Farley followed hard upon the fact that they both wore Guild buttons throughout the day on Tuesday.

Lugoff gave an explanation for the timing of Hickey's dismissal, but the quality of his testimony in that regard detracts from the force of his explanation. Asserting at one point that she was paid for the full week, although discharged several days before the end of the work week, in order to give her "time to look for another job," he later summarized his alleged reasons for the timing of the dismissal as follows: "* * * I wanted to give her a break to look for another job but I did not want to hurt the company in the meantime. Monday and Tuesday are very busy days and if she had been let go on Monday, I would have had to put a new girl on that particular job, which would cut the (advertising) lineage and so forth." I do not rule out,

as improbable, a claim that a firm which had been "losing considerable money" for much of the year and had just embarked on an "economy drive" would pay an employee a full week's wages, upon her dismissal during the middle of the week, in order to facilitate her search for another position. Business practices in that regard would obviously depend upon a number of variables. However, there is reason to question Lugoff's assertion that a motivating factor in the delay in notifying Hickey of her dismissal was concern over placing "a new girl" in Hickey's position on "very busy days." The fact is, as Lugoff conceded at a subsequent point, that Hickey's replacement was not at all "new * * * on that particular job." The "new girl" had previously worked in the Bellflower office before Hickey was hired, performing the very duties to which Hickey succeeded when she was hired. Upon Hickey's employment, her predecessor was transferred to another office; and upon Hickey's discharge, according to Lugoff, the same girl assumed Hickey's functions in addition to her own. This combination of duties in the replacement would make for plausibility in Lugoff's explanation that he deferred discharging Hickey until the "very busy days" had passed were it not for the course his testimony on the subject took. After it developed that the "new girl" was in fact a woman who was then in the Respondent's employ and had been Hickey's predecessor in the Bellflower office, there was some shift in emphasis in Lugoff's explanation, for he testified that his primary reason for defer-

ring the dismissal for two days was because he "wanted to keep Gloria Hickey on and give her a break." It was evident to me, upon observation of Lugoff, that at one point he placed substantial emphasis on his alleged concern over the replacement of Hickey by a "new girl" on two busy days, but when further examination developed that the "replacement was actually an old hand, familiar with Hickey's duties, he attempted to minimize any adverse effect that that development might have upon the plausibility of his explanation by shifting away from his expression of concern over placing a "new girl on that particular job" to primary emphasis upon an explanation that he deferred Hickey's dismissal for two days because he "wanted to keep Gloria Hickey on and give her a break."

But the quality of Lugoff's testimony concerning the timing of Hickey's discharge is not the only reason for rejection of his explanation. In my judgment, it follows the pattern of afterthought justifications exemplified by Smith's untenable explanation of the reason for the advertisement of October 21. In the light of the whole record, a far more plausible explanation for the timing of Hickey's discharge, as well as that of Farley, is to be found in the conclusion that the Respondent moved expeditiously, as in the case of Ross, to discharge Hickey and Farley soon after they showed an interest in the Guild by wearing that organization's buttons. That conclusion is supported by the undisputed evidence of what occurred on the morning

when the women were discharged. On the very occasion when he dismissed Hickey, Lugoff expressed regret for his action and stated that her work had been satisfactory as far as he was concerned. (There is also undisputed evidence that he complimented Hickey for her work during the previous month.) In the face of this evidence, I am unable to accord any weight to the claim Lugoff advances now that he selected Hickey for the reduction in staff because there had been friction between them, nor to another claim he makes to the effect that, although Hickey's production did not enter into his decision "on a big scale," it played something of a role because he "figured" that the friction between them had been "hurting her production." Moreover, after Lugoff's initial explanation to Hickey that she was being discharged as an economy measure, there was practically tacit recognition by him, during later phases of their conversation, that her dismissal was attributable to her interest in the Guild. Thus, after she expressed dissent from the reason he gave her and stated that she was being discharged because she was wearing a Guild button, he replied that he was sorry she "was mixed up in the Guild because * * * they would not be able to do anything" for her. When she protested that she could not be discharged for Guild activities, he recalled that he had been involved in "a situation like that some fifteen years ago" in connection with another newspaper and that "nothing ever came of it."

The circumstances of Farley's discharge add weight to the conclusion that both her dismissal and that of Hickey were no more than the product of a hasty decision to carry out the policy expressed about a month earlier by Lugoff that participation by an employee in Guild activities would result in that individual's "immediate dismissal." Lugoff's call to Murray was no more than a part of the setting in which the former discharged Hickey. Why Lugoff should be "waiting" for Murray is nowhere explained by the Respondent, but the whole setting suggests a hastily formulated purpose to tie into one package the discharge of the two employees who had worn Guild buttons in the Bellflower office on the previous day. Murray's testimony concerning his role in the matter reflects vagueness. It should be borne in mind that he is a supervisor, with the title of sales manager. Yet, according to his account, he acted as no more than a messenger in delivering Farley's check, coming from Compton, some eight miles from Bellflower, to do so. He stated that he was not "clear" as to who asked him to deliver the check, and, in that connection, his testimony took an odd turn at a later point, for when the subject of his recollection of who gave him the check was raised again, he testified: "Presumably the girl that types the checks up. It could have been one of the three girls." He also stated that it was at the request of one of the office girls that he delivered the check. It seems strange that a supervisor should run an errand for an unidentified office girl, but stranger yet that he should do

so in a situation where, as Murray testified, "a regular messenger run" was available for delivery of the check, and that it "could have gone by that method." I believe that Murray was less than frank in his account of his knowledge of the circumstances of Farley's discharge. Significantly, on that score, when Farley expressed disbelief that she was being discharged for economic reasons, he replied, "If economic measures don't hold up, we will go into the efficiency of your work." This of itself indicates that Murray's role was something more than to run an errand for some office clerk, but apart from that, it is evident that Murray was the voice of management, and that when it spoke it evinced a disposition to search for reasons to cloak an unlawful motivation for Farley's dismissal.

After Hickey's discharge, she applied for unemployment compensation to the California Department of Employment. She filled out a required form which includes a space for the listing of the reasons for the termination of the applicant's employment. In the space so provided, she wrote the words, "Economy cut-back" as the reason. Hickey testified that she told the person who interviewed her at the state office that the reason given her by the Respondent was "an economic cutback," but that she "felt fairly certain" that she had been discharged because she had joined the Guild. She also testified that she inserted "Economy cut-back" in the form because she "thought it fair to use" the reason given her by the Respondent.

The Respondent appears to regard the insertion in the form as compelling support for its position. I am unable to agree. It seems to me that it is not unnatural that an employee, in filling out a required form for her unemployment compensation, should list as the reason for termination the one given to her by her employer, even if she disbelieves the reason. In any event, as in other cases of this type,[39] one must appraise the motivation for the discharge on the basis of the whole record. So considered, to accord compelling significance to the insertion in the form is to blind oneself to the substantial evidence in this record that the reason given Hickey for her discharge was untrue.

One other feature of the evidence requires mention. Hickey testified that she remained in the Bellflower office about 30 minutes after she was given her paycheck; that after Murray arrived and gave Farley her check, she (Hickey) gave her Guild button to an employee named Fitzgerald; and that the latter wore it in "plain view" while Lugoff was in the office. Murray testified that after he delivered the check he brought, he saw three employees wearing union buttons, but he later stated that he did not see three wearing them at the same time. The evidence relating to Fitzgerald is quite fragmentary. Murray's testimony does not even identify

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[39]See, for example, Western Lace & Line Co., 103 NLRB 1408, 1463, n. 52, enforced August 17, 1954, by the Court of Appeals for the Ninth Circuit (34 LRRM 2755).

Fitzgerald by name as one whom he saw wearing a union button, and Lugoff's evidence contains no reference to her. The record neither describes Fitzgerald's duties nor identifies her immediate supervisor. There is no evidence of her employment history either before or after the discharge of Hickey and Farley.[40] Put another way, one is unable to determine such relevant matters as the length of time Fitzgerald wore the button, whether she is still employed by the Respondent, whether she was discharged, or, for that matter, whether she left voluntarily at one point or another. Against that background, I am unable to view the fact that Fitzgerald wore a union button during a brief period while Hickey, Farley, Lugoff and Murray were all together in the office as negating an inference that Hickey and Farley were discharged because they wore Guild buttons.

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[40]G. C. Exh. 6 lists all editorial employees, cashiers, PBX operators, and classified advertising solicitors on the Respondent's payroll after March 1, 1954. Also listed are all those in such classifications who were terminated after August 1, 1954. Fitzgerald appears in neither list. From the fact that she is not listed under the caption "Classified," in the exhibit it is probable that Lugoff was not her supervisor. In any event, as G. C. Exh. 6 apparently does not set forth all of the Respondent's personnel classifications, in the absence of evidence establishing Fitzgerald's classification, no conclusions can be drawn from the exhibit concerning Fitzgerald's employment history after the discharge of Hickey and Farley.

In the light of the evidence as a whole, I find that Hickey and Farley were discharged because they manifested an interest in the Guild; and that by discharging them, the Respondent violated Sections 8 (a) (1) and 8 (a) (3) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

As it has been found that the Respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As it has been found that the Respondent has interfered with, restrained, and coerced its employees in the exercise by them of rights guaranteed by Section 7 of the Act, it will be recommended that the Respondent cease and desist therefrom.

As it has been found that the Respondent has discriminated in regard to the tenure of employment of Sol London, Doris Farley, Raymond J.

Ross and Gloria Hickey, it will be recommended that the Respondent offer to them immediate and full reinstatement to their respective former, or substantially equivalent, positions[41] without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of a sum of money equal to the amount of wages such employee would have earned from the date of said employee's discharge, as found above, to the date of a proper offer of reinstatement to such employee. Loss of pay for each employee shall be computed on the basis of each separate quarter or portion thereof during the period from the date of discharge of such employee to the date of a proper offer of reinstatement. The quarterly periods shall begin with the respective first days of January, April, July and October. Loss of pay shall be determined by deducting from a sum equal to that which the employee normally would have earned in each such quarter or portion thereof, his or her net earnings,[42] if any, in any other employment during that

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[41]In accordance with the Board's previous interpretation of the term, the expression "former or substantially equivalent position" means "former position whenever possible and if such position is no longer in existence, then to a substantially equivalent position." See The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827.

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[42]The construction of "net earnings" in Crossett Lumber Company, 8 NLRB 440, is applicable here.

period. Earnings in one quarter shall have no effect upon the back pay liability for any other quarter. The Respondent shall be required, upon reasonable request, to make available to the Board and its agents all records pertinent to an analysis of the amount due as back pay and to the offer of reinstatement recommended herein.

Upon the basis of the foregoing findings of fact, and upon the entire record in these proceedings, I make the following:

Conclusions of Law

1. American Newspaper Guild, CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By interfering with, restraining, and coercing employees, as found above, in the exercise of rights guaranteed them by Section 7 of the Act, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By discriminating in regard to the tenure of employment of Sol London, Doris Farley, Raymond J. Ross, and Gloria Hickey, thereby discouraging membership in a labor organization, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2 (6) and 2 (7) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Herald Publishing Company of Bellflower, of Compton, California, its officers, agents, successors, and assigns, shall:

1. Cease and Desist From:

(a) Discouraging membership by any of its employees in American Newspaper Guild, CIO, or in any other labor organization, by discriminating in any manner in regard to the hire, tenure of employment, or any term or condition of employment of any of its employees;

(b) Engaging or attempting to engage in surveillance of any meeting of American Newspaper Guild, CIO, or any other labor organization, which the Respondent believes or has reason to believe will be attended by any person in its employ; interrogating any employees concerning their membership in, or activities on behalf of, American Newspaper Guild, CIO, or any other labor organization, in a manner constituting interference, restraint or coercion in violation of Section 8 (a) (1) of the Act; stating to employees that it will discharge any employee because of his affiliation with, or activities on behalf of, American Newspaper Guild, CIO, or any other labor organization, or that any employee has been discharged because of such affiliation or activities;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise

of their right to self-organization, to form, join or assist any labor organization, to join or assist American Newspaper Guild, CIO, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Offer to Sol London, Doris Farley, Raymond J. Ross, and Gloria Hickey immediate and full reinstatement to their respective former, or substantially equivalent, positions without prejudice to their seniority and other rights and privileges, and make each of the said employees whole in the manner set forth in Section V, above, entitled "The remedy";

(b) Post at its principal place of business in Compton, California, and at each of its other places of business in Los Angeles County, California, copies of the notice attached hereto and marked Appendix A. Copies of such notice, to be furnished by the Regional Director for the Twenty-first Region of the Board, shall, after being duly signed by the Respondent's representative, be posted by the Respondent, immediately upon receipt thereof

and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region of the Board in writing within 20 days of the receipt of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply therewith.

It is further recommended that, unless on or before 20 days from the date of the receipt of this Intermediate Report and Recommended Order the Respondent notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the Board issue an order requiring the Respondent to take the aforesaid action.

Dated this 29th day of March, 1955.

/s/ HERMAN MARX,
Trial Examiner.

Appendix A

Notice to All Employees

Pursuant to
The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership by any of our employees in American Newspaper Guild, CIO, or any other labor organization, by discriminating in any manner in regard to the hire, tenure of employment, or any term or condition of employment of any of our employees.

We Will offer to Sol London, Doris Farley, Raymond J. Ross, and Gloria Hickey immediate and full reinstatement to their former, or substantially equivalent, positions without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay suffered as a result of our discrimination against such employees.

We Will Not engage, or attempt to engage, in surveillance of any meeting of American Newspaper Guild, CIO, or any other labor organization, which we believe, or have reason to believe, will be attended by any person in our employ; interrogate our employees concerning their membership in, or activities on behalf of, American Newspaper Guild,

CIO, or any other labor organization, in a manner constituting interference, restraint or coercion in violation of Section 8 (a) (1) of the National Labor Relations Act; state to our employees that we will discharge any employee because of his affiliation with, or activities on behalf of, American Newspaper Guild, CIO, or any other labor organization, or that any employee has been discharged because of any such affiliation or activity.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join or assist any labor organization, to join or assist American Newspaper Guild, CIO, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

All our employees are free to become or remain members of American Newspaper Guild, CIO, or any other labor organization.

HERALD PUBLISHING COMPANY OF BELLFLOWER,

Employer.

Dated: .....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

United States of America
Before the National Labor Relations Board
Case No. 21-CA-2044

HERALD PUBLISHING COMPANY OF BELL-FLOWER

and

AMERICAN NEWSPAPER GUILD, CIO.

DECISION AND ORDER

On March 29, 1955, Trial Examiner Herman Marx issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support of the exceptions.[1]

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[1]The Respondent filed no specific exceptions to the Trial Examiner's findings that the Respondent unlawfully discharged Raymond J. Ross and granted a wage increase to employees to deter union

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and adopts the Trial Examiner's findings, conclusions, and recommendations, as modified below.

For the reasons indicated in the Intermediate Report,[2] we agree with the Trial Examiner that the Respondent's operations affect interstate commerce and that the Board has jurisdiction in the statutory sense in this proceeding. The Trial Examiner was of the further opinion, which we share, that the Respondent's operations fall within the Board's current plan for the assertion of jurisdiction over newspaper enterprises because the Respondent's gross value of its newspaper business amounted to at least $500,000 per annum and the Respondent

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organization, as more fully set forth in the Intermediate Report. Apart from the reasons therefor indicated in the Intermediate Report, which we regard as adequate, we adopt the Trial Examiner's findings, conclusions, and recommendations as to Ross' discharge and the wage increase in view of the absence of exceptions thereto.

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[2]The Trial Examiner correctly reported that the Respondent's annual gross income from the publication of its newspaper exceeds $500,000 but that the evidence did not disclose the extent of the excess. We find, as stated in the Respondent's brief, that its gross revenue for 1954 amounted to $1,714,377.68.

subscribed to an interstate news service and advertised nationally sold automobiles, including Ford, Chevrolet, Studebaker and Packard cars.[3] Moreover, we rely on the additional fact that the Respondent advertised many other products which, because they are commonly known to be nationally sold products, we officially notice to be nationally sold products. Among these are household appliances, electric shavers, canned vegetable and meat products, watches, and women's wear, marketed by such well-known manufacturers as Radio Corporation of America, Bendix, General Electric, Sunbeam, Ronson, Schick, Westinghouse, Elgin, Chrysler, Libby, Gerber and Playtex. In view of the foregoing, we find that the Board has jurisdiction and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Herald Publishing Company of Bellflower, Compton, California, its officers, agents, successors, and assigns, shall:

1. Cease and Desist From:

(a) Discouraging membership by any of its employees in American Newspaper Guild, CIO, or in

[3]The Daily Press, Inc., 110 NLRB 573.

any other labor organization, by discriminating in any manner in regard to the hire, tenure of employment, or any term or condition of employment of any of its employees;

(b) Engaging or attempting to engage in surveillance of any meeting of American Newspaper Guild, CIO, or any other labor organization, which the Respondent believes or has reason to believe will be attended by any person in its employ; interrogating any employees concerning their membership in, or activities on behalf of, American Newspaper Guild, CIO, or any other labor organization, in a manner constituting interference, restraint or coercion in violation of Section 8 (a) (1) of the Act; stating to employees that it will discharge any employee because of his affiliation with, or activities on behalf of, American Newspaper Guild, CIO, or any other labor organization, or that any employee has been discharged because of such affiliation or activities;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist any labor organization, to join or assist American Newspaper Guild, CIO, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring mem-

bership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Sol London, Doris Farley, Raymond J. Ross and Gloria Hickey immediate and full reinstatement to their respective former, or substantially equivalent, positions without prejudice to their seniority and other rights and privileges, and make each of the said employees whole in the manner set forth in Section V of the Intermediate Report, entitled "The Remedy";

(b) Post, at its principal place of business in Compton, California, and at each of its other places of business in Los Angeles County, California, copies of the notice attached to the Intermediate Report and marked Appendix A.[4] Copies of such notice, to be furnished by the Regional Director for the Twenty-first Region of the Board, shall, after being duly signed by the Respondent's rep-

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[4]This notice is hereby amended by substituting the words "A Decision and Order" for the words "The Recommendations of a Trial Examiner." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

resentative, be posted by the Respondent, immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Twenty-first Region of the Board in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., Sept. 16, 1955.

[Seal] NATIONAL LABOR RELATIONS BOARD,

PHILIP RAY RODGERS,
Acting Chairman;

ABE MURDOCK,

IVAR H. PETERSON,

BOYD LEEDOM,
Members.

Before the National Labor Relations Board

[Title of Cause.]

RESPONDENT HERALD PUBLISHING CO. OF BELLFLOWER'S EXCEPTIONS TO INTERMEDIATE REPORT

In accordance with section 102.46 of the Rules and Regulations of the National Labor Relations Board, Respondent hereby excepts to those portions of the Intermediate Report of the Trial Examiner, Herman Marx, filed herein and dated April .., 1955, as specified below:

I.

To the observation that "There is testimony in the record that advertisements placed by the dealers are financed from funds 'allotted' to them." (I.R. p. 3, lines 58-59.)

II.

To the observation that "and that Respondent subscribes to the newsletters in order to retain some right (not otherwise elaborated in the record)." (I.R. p. 4, lines 10-11.)

III.

To the finding that "the 'Garden and Home Magazine' Supplement to the issue of September 12, 1954, contains a substantial number of items dealing with events that occurred, or places that are located, outside the State of California." (I.R. p. 4, lines 13-16.) (Emphasis added.)

IV.

To the conclusion that cartoons "were used frequently." (I.R. p. 6, line 52.) (Emphasis added.)

V.

To the conclusion of law (re the effect of the Daily Press case). (I.R. p. 9, lines 5-16.)

VI.

To the conclusion, "that a substantial, even though unspecified, portion of the newspaper's advertising volume and revenue is derived from advertisements of nationally sold products." (I.R. p. 10, lines 18-22.)

VII.

To the conclusion that, "such a subscription (U.P. newsletter) is clearly analogous to 'membership in interstate news services.' " (I.R. p. 12, lines 2-3.)

VIII.

To the conclusion that, "It is thus evident * * * the Respondent's operation met a standard prescribed by the Board for assertion of jurisdiction." (I.R. p. 12, lines 10-13.)

IX.

To the conclusion that, "I find that the Respondent's operation affects interstate commerce; that the Board has jurisdiction of this proceeding; and that the assertion of jurisdiction will effectuate the policies of the Act." (I.R. p. 12, lines 17-20.)

X.

To the conclusion, to the effect that Murray did not accord a literal meaning to the remark of Sheets. (I.R. p. 16, line 60.)

XI.

To the finding that Murray's visit to Sheets' home was an act of surveillance within the meaning of the Act. (I.R. p. 17, lines 31-33.)

XII.

To the conclusion that Butler and Smith were not forthright witnesses. (I.R. p. 23, line 34.)

XIII.

To the finding that, "London's account of the conversation at Smith's home is essentially undisputed." (I.R. p. 27, lines 52-53.)

XIV.

To the conclusion that Respondent violated the Act by discharging London, and that Butler's statement to Fleener violated the Act. (I.R. p. 29, lines 19-22.)

XV.

To the conclusion that, "the evidence does not establish that London neglected his duties for organizational work." (I.R. p. 28, lines 38-40.)

XVI.

To the conclusion that Butler's interrogation of Ross violated the provisions of the Act. (I.R. p. 30, lines 10-11.)

XVII.

To the conclusion that the reason given Hickey for her discharge was untrue. (I.R. p. 39, lines 56-57.)

XVIII.

To the conclusions that Hickey and Farley were discharged for Union activities. (I.R. p. 40, lines 24-27.)

XIX.

To the conclusion that the activities of Respondent have a substantial effect upon commerce, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. (I.R. p. 40, lines 31-36.)

XX.

To the conclusions of law. (I.R. p. 41, numbers 2, 3 and 4.)

XXI.

To the Trial Examiner's recommendations. (I.R. p. 42, lines 1-57.) (I.R. p. 43, lines 1-5.)

All the foregoing Exceptions to the specified portions of the Intermediate Report of the Trial Examiner hereinbefore designated, are done on the general grounds that:

(1) The Findings of Fact are not supported by the evidence, and

(2) The Conclusions, holdings and recommendations excepted to, are contrary to law.

Dated: This 30th day of April, 1955.

HERALD PUBLISHING COMPANY OF BELLFLOWER,

By SIDNEY W. KAUFMAN,
Its Attorney.

Received May 3, 1955.

Before the National Labor Relations Board

[Title of Cause.]

PETITION OF RESPONDENT HERALD PUBLISHING COMPANY OF BELLFLOWER FOR REHEARING

You and each of you please take note that the petitioner, Herald Publishing Company of Bellflower takes exception to the decision of the Board in the above-entitled matter and requests a rehearing by the Board. It is respectfully submitted that the Board committed error in asserting jurisdiction in the action.

It is submitted that the jurisdictional standards of the Daily Press case, 110 NLRB 573, were not intended to apply to this situation. The mere fact that a newspaper has a gross revenue in excess of $500,000.00 should not mean that the Board should automatically assert jurisdiction. For example, sup-

pose that a newspaper with a gross revenue of more than $500,000.00 places one advertisement of a Ford automobile, in one issue during the calendar year, for which it receives the sum of $50.00. It does not subscribe to a wire service, purchase materials from out-of-state, or have any other so-called "national advertising," except for this one $50.00 advertisement. It does not appear that the Daily Press decision intended that the Board should assert jurisdiction in this type of a fact situation, but rather the jurisdictional tests of that case were intended to impose additional jurisdictional limitations upon the Board. In other words the Board would assert jurisdiction only where the newspaper had a gross revenue of more than $500,000.00 and the activities of the paper had a substantial effect upon interstate commerce. As was previously pointed out in Respondent's brief submitted to the Board, the dissent in the Daily Press case stated that the majority opinion imposed a further limitation upon the exercise of the Board's jurisdiction in newspaper cases.

It is Respondent's contention that the decision in the Daily Press case overruled prior decisions only to the extent that jurisdiction was asserted where the gross revenue was less than $500,000.00 annually. It did not overrule the prior decisions to the extent that the Board would assert jurisdiction in cases where newspaper companies held membership in or subscribed to interstate wire services, or

published advertisements of nationally sold products, where there was an insubstantial amount of activity along these lines. The mere fact that a newspaper has gross revenue in excess of $500,000.00 does not mean that it will have an impact upon interstate commerce. Nearly every newspaper, even the so-called throwaways, advertise some nationally sold product.

Without belaboring the points covered in Respondent's prior brief, the activities of Respondent relative to its interstate commerce should be noted:

Respondent did not purchase any of its materials from outside of the State of California; none of the advertisements of so-called national products were obtained from advertising agencies located outside of the State of California; none of the Respondent's newspapers were sold outside of the State of California; less than 1.3% of the total revenue received by Respondent was from the advertisement of automobiles; the use made of the other so-called nationally advertised products was inconsequential; Respondent made little or no use of the U.P. newsletters, which it received incidentally, from Sacramento, but only received such letter once weekly, and only subscribed to it in order to preserve its right to receive the regular U.P. wire service at a future date if it so desired. It is therefore respectfully submitted that the Respondent's activities fall within the de minimus rule and jurisdiction was erroneously asserted. Respondent therefore prays

that the Board reconsider its prior decision and decline jurisdiction in the instant case.

HERALD PUBLISHING COMPANY OF BELLFLOWER,

By PETER M. WINKELMAN,
Its Attorney.

Filed and served October 5, 1955.

Before the National Labor Relations Board
Twenty-first Region

Case No. 21-CA-2044

In the Matter of:

HERALD PUBLISHING COMPANY OF BELLFLOWER,

and

AMERICAN NEWSPAPER GUILD, CIO.

PROCEEDINGS

Monday, December 6, 1954

Pursuant to notice, the above-entitled matter came on for hearing at 10:10 o'clock a.m.

Before: Herman Marx, Trial Examiner.

Appearances:

BEN GRODSKY,
Appearing as General Counsel on Behalf of the National Labor Relations Board.

KAUFMAN & LELAND, by
SIDNEY W. KAUFMAN,
Appearing on Behalf of the Company.

WIRIN, RISSMAN & OKRAND, by
ROBERT R. RISSMAN,
Appearing on Behalf of the Union. [1*]

JOSEPH L. CAMPO,
Appearing on Behalf of the Union. [2]

* * *

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-J, inclusive, for identification were received in evidence, and General Counsel's Exhibit No. 1-K was marked and was received in evidence.) [9]

* * *

Mr. Kaufman: Yes, it is a motion to dismiss on the ground that the alleged employer's operations do not affect commerce within the meaning of the Act.

Trial Examiner: On the pleadings as they stand now? I understand you want to make a motion on the pleadings as they stand now?

Mr. Kaufman: Yes and of course, I will renew my motion at the conclusion of the evidence on this, but I do want to make the motion any way.

Trial Examiner: You are entitled to address yourself to the pleadings. Go ahead, sir.

Mr. Kaufman: Yes, if it pleases the Court, I move to dismiss the petition on the grounds that the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

alleged employer's operations do not affect commerce within the meaning of the Act, and that it would not effectuate the policies of the Act for the Board to assert jurisdiction herein.

Trial Examiner: I do not have to hear the other side on this because I note that there is an amendment to the complaint [11] and I am governed only by the state of the pleadings here and not by any evidence. The motion is directed to the complaint as amended.

There is an amendment to the complaint which, as I say, is couched in the terms of the jurisdictional standards which have been promulgated by the Board. I will deny the motion.

Let us go off the record now, Mr. Grodsky, and you can discuss the question of stipulations.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Grodsky: Mr. Examiner, at this time I wish to propose a stipulation as a result of my discussions with counsel, first with reference to the nature of the respondent's business and specifically going to the matter generally described in paragraph 1 (a) of the respondent's amended answer to the complaint.

I propose a stipulation that the respondent, Herald Publishing Company of Bellflower, doesn't receive any wire service from United Press but does receive two weekly news letters. One news letter is described as the "red letter service" and

consists of news from various parts of the country and comes by first-class mail.

The other weekly letter is described as the "Sacramento special service" and is received by third-class mail. [12]

Trial Examiner: And deals with what?

Mr. Grodsky: It deals primarily with news from the state capital of California.

Trial Examiner: Well, what does it deal with secondly?

Mr. Grodsky: I don't know.

Mr. Kaufman: You have covered it because you mentioned the red letter. Just say it deals with local matters.

Mr. Grodsky: All right, local matters.

Trial Examiner: I take it the Sacramento special service deals with Sacramento matters?

Mr. Kaufman: Yes. [13]

* * *

Mr. Grodsky: There is a pending stipulation and I am proposing it the way it stands, merely that you received it.

Mr. Kaufman: So stipulated with the understanding it [14] doesn't mean "use" as well as "receive."

Mr. Grodsky: Now, as to "use," we will stipulate first that you do use the Sacramento release.

Mr. Smith: No, definitely not.

Mr. Kaufman: Hold it.

Trial Examiner: May I suggest that Mr. Smith sit beside counsel in the interests of keeping regularity in the record.

Mr. Kaufman: I can only say, counsel, that I cannot enter into a stipulation pertaining to "use."

Mr. Grodsky: Right.

Mr. Kaufman: Right?

Mr. Grodsky: All right.

Trial Examiner: You are referring to the Sacramento letter?

Mr. Kaufman: For either letter.

Mr. Grodsky: For either letter.

Trial Examiner: And I understand that you have pointed out that "receive" doesn't include "use" here?

Mr. Kaufman: That is correct, sir.

Mr. Grodsky: All right. Well, I will propose a stipulation now, addressing myself to paragraph 1 (b) of the amended answer, the stipulation being as follows;

That the respondent has indefinite agreements with the Chicago Sun Times Syndicate of Chicago, Illinois, the Harry Cook Syndicate of New York City, New York, and the McNaught [15] Syndicate of New York City, New York, for the use of two-column panel cartoons, which are furnished by each of the syndicates and does use the cartoons.

Mr. Kaufman: No, I cannot—may I consult with my client off the record, please?

Trial Examiner: Yes, sure.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Kaufman: The stipulation as offered cannot be entered into by counsel. [16]

* * *

SUMNER HARTWELL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Grodsky

Q. Will you state your name and address, Mr. Hartwell?

A. Sumner Hartwell, 12129 Gertrude Drive, Lynwood.

Q. By whom are you employed?

A. By the Herald Publishing Company.

Q. In what capacity?

A. National advertising manager.

Q. What are your duties in that connection?

A. Well, they are primarily—it is part of the duties that I do that I handle several local food accounts and schedule the national advertising.

Q. Now, what is national advertising as you people in the Herald Publishing Company use that phrase?

Mr. Kaufman: Well, I am going to object to that. It is calling for the conclusion of the witness and isn't a proper question.

Trial Examiner: I will overrule the objection.

The Witness: Well, it is that advertising that

(Testimony of Sumner Hartwell.)

our sales force is able to secure from local dealers, local food [19] accounts, local stores that have funds they have secured from their purchases of merchandise.

Trial Examiner: Why do you call that "national advertising"?

The Witness: I don't know but the term has always been used in the twenty-seven years that I have been in the newspaper business.

Q. (By Mr. Grodsky): How long have you been with the Herald Publishing Company?

A. Thirteen years on the 21st of last September.

Q. Have you always had this same position of national advertising manager? A. No.

Q. When did you get that position?

A. Approximately five years ago.

Q. Was there someone else who occupied that position? I mean, before you?

A. Well, not actually, Mr. Brewer handled the national advertising at the time.

Q. What was his position at that time?

A. General manager of the newspaper.

Q. When you say "the newspaper," you mean the entire chain? A. That is right.

Q. And he still has that same job?

A. No, he is now vice president of the Herald Publishing [20] Company.

Q. Who is the general manager of the Herald Publishing Company at this time?

A. Colonel C. S. Smith.

(Testimony of Sumner Hartwell.)

Trial Examiner: What chain is that? I am not aware of any chain yet.

The Witness: We have nine separate community newspapers that are published—do you want to know the names of those that are published in——

Trial Examiner: No. By "we" you mean the newspapers?

The Witness: Yes.

Q. (By Mr. Grodsky): All being in the southern part of the Los Angeles county?

A. That is right.

Q. And they are all published at one single printing plant, which is located in Compton?

A. We have two printing plants there, one on Magnolia and one on Palm.

Q. Both printing plants are in Compton?

A. Yes.

Q. That is where the headquarters of the chain is? A. That is right.

Q. Do you know why you were designated "national advertising manager" at the time you were?

Mr. Kaufman: I am going to object to the question as [21] not proper examination of a witness. Whether or not he knows why, I think, is irrelevant and immaterial and not within the issues of this case.

Trial Examiner: What is the relevance, counsel?

Mr. Grodsky: I could see how it could be relevant, Mr. Examiner, if the pressure of business

(Testimony of Sumner Hartwell.)

and the increasing volume of advertising made it encumbent to establish a new position.

Trial Examiner: Well, of course, the terms of the definition of "national advertising" might be quite unimportant. I think it is probably preliminary and I will permit the question, if he knows.

The Witness: I haven't the slightest idea.

Trial Examiner: All right.

Q. (By Mr. Grodsky): What kind of advertising and by what kind of advertising, I mean what type of advertisements are the kind which are classified in your organization as "national advertising"? A. Well, we have some——

Mr. Kaufman: Now, just a minute, just a minute. That is assuming a fact not in evidence. In the first place, we do not classify anything as "national advertising" within the meaning of the Act. The question itself means nothing standing alone.

First, there is no showing that this witness has any [22] authority to do any classifying and secondly, there is the question, as I see it, and it throws no light on our problem at all.

Trial Examiner: Well, I will assure counsel of one thing. I am not going to decide this case on the basis alone of semantic niceties. The Board has used a term, "national advertising" here. I think I know what they had in mind. You folks may think you know what the Board had in mind and we may all differ.

I am going to take this witness' testimony as to his knowledge, that the company with which he

(Testimony of Sumner Hartwell.)

has been identified for a very substantial time has such a thing as "national advertising" and at least identifies certain information as "national advertising."

I construe Mr. Grodsky's question, when he spoke of "classifying" as identifying. If I am in error, Mr. Grodsky can correct me.

Mr. Grodsky: That is right.

Trial Examiner: If there is any doubt in your mind, you can ask me please. I will overrule the objection.

The Witness: May I please have the question read to me?

(Question read.)

Mr. Grodsky: I will change the word "classified" to "identified." [23]

Trial Examiner: All right.

The Witness: For the most part, it is that advertising that our salesmen are able to dig up among local accounts that have quotas of advertising funds from merchandise that they have purchased, and to try to persuade the local merchant to spend his money in our newspaper rather than in bill-boards, direct mail service or other medium of advertising.

Trial Examiner: Can you, of your own knowledge, identify any names of any products that have been covered by such advertising?

The Witness: Oh, yes, this brassiere advertising that you saw.

Trial Examiner: I did not see it.

(Testimony of Sumner Hartwell.)

Mr. Grodsky: The Examiner did not see anything.

The Witness: I beg your pardon. The brassiere advertising that you have seen, of which we have another, I would guess, about twenty-five or thirty accounts in our various newspapers. They are allotted an advertising quota.

Luizanne coffee, of which Colonel Smith buys a great quantity, has influenced them to spend money out of their quota of advertising allowances.

Trial Examiner: Influenced whom, sir?

The Witness: The roster, I believe.

Trial Examiner: Who is that? [24]

The Witness: That is the producer.

Trial Examiner: What is the name again, I did not get it?

The Witness: Luizanne coffee.

Trial Examiner: Do you know where they are located?

The Witness: On Olympic, east of Soto.

Trial Examiner: In Los Angeles?

The Witness: Yes.

Trial Examiner: Can you continue with some other names, please?

The Witness: Practically all the automobile dealers have sums of money that are allotted on the sales of their goods.

Trial Examiner: Would you know the names of any of the cars?

The Witness: Ford, Chevrolet, Studebaker, Packard.

(Testimony of Sumner Hartwell.)

Trial Examiner: Can you think of the names of any other products offhand?

The Witness: Burgermeister beer, Cinch cake-mix.

Trial Examiner: Which?

The Witness: Cinch cake-mix.

Trial Examiner: Is that the name of the manufacturer of the product, Cinch?

The Witness: Yes, I think it is.

Trial Examiner: Do you know where they are located?

The Witness: Frankly I don't. [25]

Trial Examiner: Well, perhaps it is a subject that you are getting around to. For the moment, I now have a notion of what he has in mind.

Mr. Grodsky: Yes.

Q. (By Mr. Grodsky): I will show you——

Mr. Kaufman: May I see it first, counsel?

Mr. Grodsky: Yes.

Mr. Kaufman: You are using this for example only?

Mr. Grodsky: Yes.

Q. (By Mr. Grodsky): I will show you for example only, what purports to be a complete issue of the Paramount Hollydale edition of the Herald American, dated through September, 1954, and ask you if you will, sir, inspect this and say whether that is, to the best of your knowledge, what I represented to you that it is?

Trial Examiner: Did you identify it as General Counsel's Exhibit No. 2?

(Testimony of Sumner Hartwell.)

Mr. Grodsky: I am only going to use this for illustrative purposes. I don't think I will give it an identifying number.

Trial Examiner: Well, we ought to have a handle so to speak, whether you introduce it later is a different question.

Let us call it General Counsel's Exhibit No. 2 for identification.

Mr. Grodsky: All right. [26]

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Trial Examiner: Go ahead.

The Witness: So far as I know, that is the edition of the Herald American through September 16, 1954.

Q. (By Mr. Grodsky): Now, in looking through it, Mr. Hartwell, I would like you to go through it and to call our attention to what has previously been identified as "national advertising."

What about this one (indicating)?

A. No.

Trial Examiner: I think we ought to keep the record clear here. Let us not have private colloquy unless the witness specifically refers to something in General Counsel's Exhibit No. 2 for identification, and then we will know what he is talking about.

Suppose you continue to look through it carefully and take your time and Mr. Grodsky can ask the

(Testimony of Sumner Hartwell.)

questions after you have done so. Look through it carefully and take your time.

The Witness: All right. There is a national advertisement (indicating).

Trial Examiner: The witness identifies an advertisement which we will call "Lucky Lager," for the purposes of identification in General Counsel's Exhibit No. 2. [27]

It is simply in General Counsel's Exhibit No. 2 and whoever has to identify it later, will look for it.

Q. (By Mr. Grodsky): May I ask the witness, approximately how large is that advertisement?

A. That is 1,000 lines, sir.

Trial Examiner: Pardon me, is it accurate to say that 1,000 lines would be approximately about three-fifths of a page?

The Witness: Well, it is exactly six columns by seventeen inches, that is one hundred and two inches, and there is one hundred and sixty-eight inches on the page, that is about three-fifths.

Trial Examiner: All right, sir.

The Witness: There is a Luzianne coffee advertisement (indicating).

Trial Examiner: The witness identifies a name "Luzianne coffee" located in General Counsel's Exhibit No. 2.

Mr. Kaufman: Do you want to get the size of that, too, while we are at it?

The Witness: That is three column, eleven inches, thirty-three inches.

(Testimony of Sumner Hartwell.)

Trial Examiner: Would you say maybe one-sixth of a page or thereabouts?

The Witness: Yes, it is a little less.

Trial Examiner: I do not think we need be very precise [28] about it, just give us your best estimate on these.

The Witness: Norway sardines, two column, four inches, eight inches.

Trial Examiner: That is an advertisement, as I see it, that is probably about four inches by four inches.

The Witness: Two column by four inches equals eight inches, one-seventeenth of a page.

Trial Examiner: All right, sir.

The Witness: To the best of my knowledge, that is all the national advertising in there.

Mr. Kaufman: Now let us, for the purposes of the record, and I apologize if I am speaking out of turn, but to button this up all under one button as the saying goes, let us indicate that the witness has examined this General Counsel's Exhibit No. 2 for identification which consists of—can you tell us how many pages there are, if you will?

The Witness: I will have to count them—forty pages.

Trial Examiner: The witness has testified that there are forty pages, gentlemen, is there any question that the pages are what might be referred to criteria as "standard newspaper pages"?

How many would those be in terms of columns?

(Testimony of Sumner Hartwell.)

The Witness: There are three hundred and twenty columns.

Trial Examiner: But what I mean is, is there such a thing as a "standard size newspaper page"? [29]

The Witness: Yes and it consists of eight columns.

Trial Examiner: All right.

Q. (By Mr. Grodsky): I am calling your attention, with the possibility that you may have overlooked it, to two of these advertisements.

A. Yes.

Q. One advertisement which purports to be an advertisement for R.C.A. Victor, that is, the entire advertisement is devoted to R.C.A. Victor and I ask you whether this advertisement, if you know is—— A. It isn't.

Trial Examiner: It isn't what you have referred to as "national advertising"?

The Witness: That is right.

Trial Examiner: I see.

Q. (By Mr. Grodsky): I will call your attention to this advertisement which entirely is devoted to introducing "Playtex" Living Brassiere and it takes up seven-eighths of a page approximately, and I ask you whether that advertisement is national advertising? A. It isn't.

Q. How are you so sure about that?

Trial Examiner: Well, now, Mr. Grodsky, he has answered the question.

Mr. Grodsky: I know that. [30]

(Testimony of Sumner Hartwell.)

Trial Examiner: All right, go ahead.

Q. (By Mr. Grodsky): How are you sure about it?

A. It was placed by Lee's Department Store and charged to their account.

Q. Now, are these advertisements that you have identified as "national advertising," were they placed by any one other than the local merchant?

A. Only through the influence of the local merchants.

Q. You apparently did not hear my question. My question is were they placed by any one other than the local merchant? A. Yes.

Mr. Kaufman: What do you mean by "these advertisements"? The question for a record later is, I believe, a little puzzling.

Trial Examiner: Well, there is some continuity. I think counsel was referring to the Lee's advertisement and if I am not correct, I may be corrected. Is that so, Mr. Grodsky?

Mr. Grodsky: Yes, when I said "these advertisements" I meant that these advertisements are placed by someone other than the local merchants. I also referred to the advertisements that the witness had testified to as being under national advertising.

That is what you understood, isn't it?

The Witness: Yes. [31]

Trial Examiner: Oh, I see, well I was in error. You had better identify the advertisements when you refer to them, Mr. Grodsky.

Mr. Grodsky: Yes.

(Testimony of Sumner Hartwell.)

Q. (By Mr. Grodsky): You testified about a "Lucky Lager" advertisement; by whom was that advertisement placed?

A. If I am not mistaken, McCann & Errickson.

Trial Examiner: Do you know in general what type of business they have?

The Witness: They are an advertising agency.

Q. (By Mr. Grodsky): Now you testified that some of this national advertising is automobile advertising? A. That is right.

Q. By whom is that advertising generally placed if there is any general rule about it? Is it placed by the local merchants?

A. The local merchant has the influence, yes.

Q. That doesn't answer my question. Does he give you the order or does he sign the contract with you?

A. Well, we pick up mats and the order from him, yes.

Q. And how do you know that it is national advertising?

A. Well, by virtue of the statement that I gave you of what we call "national advertising." We have salesmen who call on all the automobile dealers and persuade them to spend as much of their profit as they can in the local newspapers. [32]

Q. I understand that, sir. Now, coming back to this Lee's Department Store advertisement which involved the "Playtex" advertisement. You testified that you knew that that was local because you received the order for it from the official Lee's

(Testimony of Sumner Hartwell.)

Department Store? A. That is right.

Q. Now, wouldn't that be true, say, on a Ford or a Chevrolet advertisement, that you would receive the order locally?

A. Well, not necessarily. We have salesmen who might handle certain department stores, certain sections of the city and certain types of accounts, and the salesmen who handled that knew that Lee's had an allotted amount of money to spend, to solicit them, and from which we got the sale. We have perhaps twenty or twenty-two accounts.

Q. I am a little confused now. Will you—are you telling us now that your salesman knew Lee's had some money to spend from the "Playtex" people? A. Yes.

Q. For that advertising? A. That is right.

Q. And then that would be national advertising?

A. No, not at all.

Trial Examiner: Well, I am quite unclear as to the distinction.

Mr. Kaufman: He asked him for a description and he is [33] doing the best he can.

Trial Examiner: We are not suggesting that the witness isn't but obviously there appears to be some doubt here and we will try to clarify it.

Q. (By Trial Examiner): If I understood you correctly, you defined as "national advertising" before, advertising of a product which is sold by a local merchant, but for the advertisement of which he has some funds? A. That is right.

Q. From the manufacturer of the product?

(Testimony of Sumner Hartwell.)

A. That is right.

Q. And do I understand you that that was the situation with the Lee's advertisement?

A. That is an assumption on my part that the salesman knew about it. I do know that there are various wholesalers or even distributors who will come in and tell us, "Why don't you jack this account up? They have some funds to spend," and if we know of any orders, we go around and pick them up, most assuredly.

Q. Now, let me ask you this. Referring to that advertisement, I notice that there is a picture of a woman with a bra, that is, it is apparently a sketch.

A. Yes.

Q. Now, is that made up in your establishment?

A. No, it isn't. [34]

Q. Can you tell by looking at it and from your knowledge and experience of your business, can you tell where that came from?

A. I would say "yes." The man that writes the Lee's advertising had in his file probably many mats of this sort in various sizes and put it together for their advertisement in our paper.

Q. Well, do you know whether this mat was prepared, and I ask whether you know, by Lee or by the manufacturer?

A. I don't know actually.

Trial Examiner: Well, Mr. Grodsky, as I see it right at this point—I said before that there is more in these cases than semantic niceties. There is a

(Testimony of Sumner Hartwell.)

Statute and an Act involved and a law of Commerce and that is what we are interested in.

Now, the witness has described for us what he considers is "national advertising." I detect a trend as to first-hand knowledge on the advertising involved and I think he doesn't know whether the Lee's advertising conforms to his definition of "national advertising."

Mr. Grodsky: The only reason I explored it, as the record will indicate, a previous answer of his threw me off.

Trial Examiner: I would suggest that that be General Counsel's Exhibit No. 3 for identification.

Mr. Kaufman: Yes, if I may be so bold, I would suggest [35] that it should be called General Counsel's Exhibit No. 3.

Trial Examiner: That will be read into the record and it will become General Counsel's Exhibit No. 3 for identification.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

Trial Examiner: Go ahead, sir.

Q. (By Mr. Grodsky): I will now show you General Counsel's Exhibit No. 3 marked for identification, which purports to be a copy of Herald American Garden and Home Magazine, of the issue dated Sunday, September 12, 1954, and ask you whether my description of General Counsel's Exhibit No. 3 is what it purports to be?

(Testimony of Sumner Hartwell.)

A. I would say that it is, yes.

* * *

Q. (By Mr. Grodsky): Mr. Hartwell, I will show you General Counsel's Exhibit No. 3 for identification and on the second of last page is a full page advertisement, and by the way, this is an advertisement for "Playtex Magic-Controller." [36] Am I correct? A. Yes.

Q. Now, do you know whether or not this advertisement is national advertising?

A. I do.

Mr. Kaufman: Well, now, just a moment.

Trial Examiner: Have you a motion?

Mr. Kaufman: I move that the answer be stricken for the limited purpose of permitting me to object to the question.

Trial Examiner: I will treat it as a motion. Why don't you treat it with the merits of a motion?

Mr. Kaufman: The question is ambiguous. If the reporter will read it back, I will answer more fully.

(Question read.)

Mr. Kaufman: "Do you know whether or not this advertisement is national advertising," within your definition, sir. What I am getting at is I want the witness to restrict his answer to his definition rather than perhaps counsel's or my own or somebody else's.

Mr. Grodsky: I will stipulate——

Trial Examiner: Excuse me a minute. I don't

(Testimony of Sumner Hartwell.)

really get the point of this. You will have an opportunity to clarify any point in the witness' testimony that you think might need clarification through cross-examination and other evidence. [37]

I am assuming that thus we will save testimony that speaks for itself as to what national advertising is. I will not undertake to define it at this point. I will deny the motion.

Q. (By Mr. Grodsky): Is this national advertising? A. No, it isn't.

Q. From your knowledge of layout and so forth, could you express an opinion as to whether this advertisement was prepared by the same agency, that is, the same person or group of persons who prepared the advertisement which we were discussing in General Counsel's Exhibit No. 2, the Lee's advertisement?

A. From looking at it, I would say "yes."

Trial Examiner: And what agency is that?

The Witness: I have no idea. We dealt strictly with Mobert's.

Q. (By Mr. Grodsky): And Mobert's is the firm which advertised in General Counsel's Exhibit No. 3; is that correct? A. Yes.

Trial Examiner: That, I take it, is a retailer?

The Witness: That is right.

Trial Examiner: Mr. Grodsky, we better have General Counsel's Exhibits Nos. 2 and 3 just together. I don't know yet whether any party may wish to offer them here. I may do so [38] myself as a Trial Examiner's Exhibit.

(Testimony of Sumner Hartwell.)

Mr. Grodsky: Well, I will just have to warn you that you will have no duplicates because I don't have duplicates of these.

Trial Examiner: The company has so it is all right. It might be very easy for you to purchase a duplicate from the company. Go ahead.

Q. (By Mr. Grodsky): Mr. Hartwell, you testified that Burgermeister beer was an additional account of national advertising; do you recall that that is correct? A. Yes, I did.

Q. And through what agency is that placed with you?

A. I am not absolutely sure. It is a San Francisco agency.

Q. How do you get these accounts from San Francisco agencies? What method of operation do you use to get the accounts?

A. Do you want the inception of how we go about putting a Burgermeister advertisement into our paper?

Q. Yes.

A. Well, Colonel Smith with seven stores and with a liquor outlet in each store, purchases a great amount of beer and he brings pressure to bear on the managers of his various stores, and buyers, and brings pressure to bear on the salesmen, and the salesmen in turn, brings pressure on his company to allot some of the money for advertising in our newspapers. [39]

Q. And that money allotted say by the Burger-

(Testimony of Sumner Hartwell.)

meister Brewing Company, and they, through their own agency, place the advertisement?

A. That is right.

Q. You do not recall the name of the agency?

A. No, but I can get it.

Q. Would the same thing be true of the "Lucky Lager" advertisement that we were discussing?

A. Substantially, yes.

Q. Do you have any other advertisements that have been placed through agencies? A. Yes.

Q. Which that you can recall?

A. Well, the Norway Canners.

Q. Yes. A. Which is McCann Errickson.

Q. Yes. A. Luzianne coffee.

Q. Which agency is that?

A. It is Heintz & Company, Los Angeles.

Q. Yes. A. Hills Brothers' coffee.

Q. And through what agency?

A. They are in San Francisco also. It slips my mind for the moment. [40]

Trial Examiner: Perhaps you will refresh your recollection after lunch and give it to us then.

The Witness: N. W. Ayer & Company.

Q. (By Mr. Grodsky): Who?

A. N. W. Ayer & Company.

Q. (By Trial Examiner): Do the Hills Brothers' advertisements appear under the name and format of a retailer in the newspaper or does just "Hills Brothers" appear without reference to a retailer or do you have both types of advertisements in this relation?

(Testimony of Sumner Hartwell.)

A. Yes, the one that I am specifically referring to is over the name of "Hills Brothers" with no identification of local merchants. However, in practically every edition of our papers, there is Hills Brothers' advertising in the various grocers' own advertisements.

Q. Is that national advertising where it appears in conjunction with the grocer, as you put it before?

A. No.

Q. It isn't? A. No.

Trial Examiner: All right.

Q. (By Mr. Grodsky): Now, Mr. Hartwell, on what basis are you paid for your work? I am not asking now the amount of compensation you receive but on what basis are you paid; is it a [41] percentage? A. No.

Q. On volume of business? A. Salary.

Q. Just a straight salary?

A. Yes. Now, there are occasions during the year, for instance, in October we had a sales contest in which there were monies distributed among salesmen and we have had, at Christmas time, small bonuses that have augmented our salaries.

Q. Again without figures, does your salary represent say, 90% to 95% of your total annual income from the company? A. Yes.

Q. (By Trial Examiner): Getting back to the specific placement of the Hills Brothers' advertisement and how you had one in mind through an agency, do you recall whether that was a single advertisement or for a period of time?

(Testimony of Sumner Hartwell.)

A. We had one advertisement which occurred, that was in July, and one more in October, and that is approximate.

Q. And did they run for the single issue or for a number of issues?

A. They ran for one issue but in all nine zones.

Q. In all nine zones on one specific day?

A. Yes.

Q. And with respect to "Lucky Lager," what was the situation?

A. I believe we have had from spring until now, possibly [42] three "Lucky Lager" advertisements.

Q. In all nine zones? A. Yes.

Q. And they ran in three issues in each zone?

A. Yes.

Q. And when you spoke of July and October and the spring, all periods refer to 1954?

A. That is right.

Q. (By Mr. Grodsky): Now, you testified as to brassiere advertising generally, that you had twenty to twenty-five accounts, who had a quota from the manufacturer for advertising?

A. That is right.

Q. Do you get that business, or what portion of it you get, do you get that from the retailer directly?

A. Directly from the retailer and from solicitation.

Q. Do you have that advertising revenue segregated in any way from other advertising revenue?

A. I don't know how the accounting department handles that.

(Testimony of Sumner Hartwell.)

Q. Who is in charge of the accounting department? A. Al Huber.

Q. And what is his title, if you know?

A. Comptroller.

Q. And is his office located on Magnolia Street and Compton? [43]

A. He is in the Palm Street building.

Q. What is the address of that building?

A. I don't know. It is at the corner of Palm and Alameda.

Q. It is in Compton? A. Yes.

Trial Examiner: I take it that you folks may try to arrive at an approximate figure by stipulation as to the revenue represented by this kind of advertising?

Mr. Grodsky: I will make an effort to.

Trial Examiner: Mr. Kaufman is indicating by signalling, and it is possible that he has some such motion in mind. I presume you are trying to avoid taking these persons away from business if possible.

Mr. Grodsky: That is right.

Mr. Kaufman: Yes, if we have the information available. I have made no attempt to go through any records to determine if there is any breakdown and whether it is made on their defense or the Colonel's or what the Board requires, but I will try to get the information.

Trial Examiner: I would suggest that it be quite precise. That is important in dealing with these commerce cases. I have seen many stipula-

(Testimony of Sumner Hartwell.)

tions, for example, that business is in excess of a number of dollars per year, but govern yourself, it is merely my suggestion.

Mr. Grodsky: Right. I have no further questions from [44] this witness.

Cross-Examination

By Mr. Kaufman:

Q. The agencies that you mentioned, Mr. Hartwell, for instance, on the Norway canners and the Luzianne coffee and Hills Bros. coffe, are all local agencies, aren't they? A. That is right.

Trial Examiner: What agents are you referring to, sir?

The Witness: McCann Errickson, Heintz & Company.

Trial Examiner: I see. I understand now and by "local" you mean Los Angeles and in connection with McCann Errickson, do you mean San Francisco?

The Witness: McCann Errickson is San Francisco and Heintz & Company is Los Angeles. However, McCann Errickson have a Los Angeles office.

Q. (By Mr. Kaufman): Do you deal with that Los Angeles office sometimes?

A. We have in the past. I cannot remember the specific account, sir.

Mr. Kaufman: No further questions.

(Testimony of Sumner Hartwell.)

Redirect Examination

By Mr. Grodsky:

Q. Do you know where the headquarters of McCann Errickson are?

A. I am not sure whether it is Los Angeles or San Francisco.

Q. Do you know whether they have an office in New York? [45]

A. I do not believe so. They probably have representation there and yet I am not certain. They have two offices in Los Angeles.

Q. Do you know where the headquarters of N. W. Ayer & Son is?

A. No, I cannot answer that.

Q. Do you know whether they have an office in New York? A. I don't know.

Q. (By Trial Examiner): Have you dealt with the San Francisco office of McCann Errickson?

A. Actually not, the order came from San Francisco on both these with Hills Brothers.

Trial Examiner: Well, that answers that question.

Mr. Kaufman: I have no further questions.

Q. (By Trial Examiner): One point that I have in mind; do you have occasion to see the issue of one of the nine newspapers every time it comes out?

A. No, not necessarily. That is, to thumb through each edition separately on the day it comes out?

(Testimony of Sumner Hartwell.)

Q. Yes. A. No, not necessarily.

Trial Examiner: All right, that is all I have.

Mr. Grodsky: I have not quite finished.

Q. (By Mr. Grodsky): Mr. Hartwell, before going to work for the Herald Publishing Company, you were employed in the [46] newspaper business?

A. That is right.

Q. Where? A. In Elyria, Ohio.

Q. In what capacity?

A. As advertising manager of a daily newspaper.

Q. In that capacity, did you know of the firm of McCann Errickson? A. Yes, I dare say.

Q. And did you know of the firm of Ayer & Sons? A. Yes.

Q. Did you deal with them? A. Yes.

Q. What office did you deal with at that time?

A. Probably Chicago and Detroit.

Trial Examiner: And you have dealt with them for what purpose?

The Witness: Advertising.

Trial Examiner: Do you remember what kind of advertising?

The Witness: That was fourteen years ago.

Trial Examiner: Do you remember at all?

The Witness: No, I don't.

Trial Examiner: Do you remember any products at all that you had any dealing with either firm, in connection with [47] advertising?

The Witness: Yes, N. W. Ayer. We had one account. If I remember correctly, it was Coca-Cola.

(Testimony of Sumner Hartwell.)

Trial Examiner: Anything else?

The Witness: Not to my best knowledge. [48]

* * *

C. S. SMITH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: Perhaps you had better speak up, Mr. Grodsky, for this witness.

Mr. Grodsky: Yes.

Direct Examination

By Mr. Grodsky:

Q. Will you state your name and address, please.

A. C. S. Smith and I reside at 206 North Mayo in the City of Compton.

Q. Mr. Smith, what is your position with the Herald Publishing Company of Bellflower?

A. I am the president of the company.

Q. And do you actively participate in the management of the company?

A. I do at the present time.

Q. And did you during July and August of this year?

A. No, I did not in July and August, except, incidentally I might qualify that, it was on a very small part-time basis. [49]

Q. During July and August were you still the president of the company?

(Testimony of C. S. Smith.)

A. Oh, yes, I have been since its inception.

Q. Did you participate in the act of management of the company before July and August of this year?

A. No, never have, except on a very small part-time basis.

Q. And when did you begin to participate more fully?

A. I took over the 1st of September of this year.

Q. And during the period of July and August, who was the general manager of the company?

A. Ralph Brewer had been the general manager for many years. Then he was promoted to vice president and went on an extended vacation. His health was very bad.

Q. Do you expect Mr. Brewer to return——

A. He is back now.

Q. And is he participating in the affairs of the company? A. Oh, yes.

Q. Is it your present intention for him to resume his position of general manager?

A. I couldn't hear that.

Q. Is it your present intention for him to resume his position of general manager?

A. Possibly in the future if his health will permit. At the present time he is on some very important special work which keeps him busy full time so I am pinch hitting until [50] that time comes around.

(Testimony of C. S. Smith.)

Q. Where is the headquarters of the Herald Publishing Company?

A. 218 East Magnolia in Compton.

Q. And is your office there?

A. No, I do not have a regular office. I transact most of my business out of my home.

Q. What operations are carried on at this Magnolia Street address in Compton?

A. Typesetting, composing, stereotyping and part of the press work, and some of the editorial work.

Q. Do you have any other editorial office in Compton? A. In Compton?

Q. Yes.

A. No, not in Compton. Yes, we do. It is in Palm Street, Palm and Alameda.

Q. How is the editorial work broken down as between these two plants?

A. Well, all the speciality magazine work is over on the Palm Street side and then Compton and Lynwood and general supervision over the eastern offices is on the Magnolia Street side.

Trial Examiner: By "eastern" you mean eastern localities in the Los Angeles area?

The Witness: Yes, they adjoin. I think the furthest [51] away is probably ten to twelve miles.

Q. (By Mr. Grodsky): What is the circulation of your newspaper, considering all nine of them now, as a unit?

A. Approximately 142,000 twice a week. I think the Sunday is slightly less than that because there

(Testimony of C. S. Smith.)

are two zones that do not publish on Sunday.

Q. Do you have the same publication date for all of the papers?

A. They are all printed on Wednesday night and on Saturday night.

Trial Examiner: While we are on the subject, with reference to speciality magazines, what are those?

The Witness: That is our "Home and Garden" section which appears in the Compton and Lynwood papers only on Sunday.

Trial Examiner: Referring to General Counsel's Exhibit No. 3 for identification, is that the speciality magazine?

The Witness: That is right.

Q. (By Mr. Grodsky): Mr. Smith, we have stipulated that your company receives the material from the United Press in the form of two weekly news letters. Now, what use do you make of that material?

A. None whatever. I can go back and explain that if you wish me to.

Q. Yes, please. [52]

A. A number of years ago we went daily in the Compton paper and we put in teletype and we subscribed to the wire service and at the end of six months, we were about to go broke, so we threw the whole works out and went back to our once a week operation.

And in order to obtain our first right on this service, if we ever wished to go back into the daily

(Testimony of C. S. Smith.)

business again, which I don't think we ever will because of the deficit we showed during that time, we just continued to pay the small amount in order to hold our priority there.

Trial Examiner: As near as you can remember, when did that cease, the use of that wire service and so on that you referred to?

The Witness: It was in 1947, was it Ralph?

Trial Examiner: I do not think we can take his answer.

Mr. Kaufman: Your best recollection?

Trial Examiner: Yes, I would like to have your best recollection?

The Witness: 1946, it has been quite a number of years since the war ended.

Trial Examiner: All right, sir.

The Witness: We do not publish anything but local news. Now, sometimes there is some need for a filler at the last minute before we go to press and then the editors will grab anything they can find to fill in. [53]

Trial Examiner: Well, counsel may ask you about that. My question has been answered.

The Witness: Thank you.

Q. (By Mr. Grodsky): I will show you General Counsel's Exhibit No. 3 for identification, and I show you page 19 thereof, and I will ask you if there is an article there which is headed "Canadian Government Lists Broad Tourist Information." Is there such an article?

A. I see it here, yes.

(Testimony of C. S. Smith.)

Q. And is the date line on that Ottawa?

A. That is what it says.

Q. Could you tell from looking at that where that originated?

A. No, I cannot. It says at the bottom "U.P." but that could be out of any daily paper. It could be out of canned information which is sent to us by some travel bureau.

Q. Would it be consistent with newspaper people to accredit something to "U.P." if it comes from another source ?

A. This is a magazine which is headed by a girl who has practically carte blanche on it. She doesn't have service to these various letters and wherever she picks the stuff, we have let her go on it because she gets it locally or everything is sent to her by some local agent. There is no policy on it except interesting reading.

Q. Who is the person in charge of this?

Trial Examiner: You referred to a girl, I [54] think.

The Witness: Some girl, I cannot even tell you her name. The salesman's name who handles it is Rogers. I can call the office and find out her name if you wish.

Trial Examiner: Well, let me ask you this. What, if you know, is the authority for the use of "U.P." which to me conventionally means "United Press" at the end of the article?

The Witness: Possibly the sheet that we got from the travel agency had "U.P." on the bottom

(Testimony of C. S. Smith.)

of it. Certainly United Press did not send us this article, because this is what we call speciality or tourist information.

Trial Examiner: Well, does your arrangement, whatever it may be, with United Press, whereby you receive information, does it give you the right to label an item that is taken from United Press, whether from another newspaper or a travel bureau as "U.P." of the United Press?

The Witness: Your guess is as good as mine. I do notice in lots of papers that they do have "U.P." after it.

Trial Examiner: What I am really referring to is your arrangement with U.P.

The Witness: We have no arrangement with U.P. except to pay them so much for this right to stay on the list if we want it, but we do not use it. It is only to retain our accredited position in case we ever wish to go daily again.

Trial Examiner: What I am trying to find out is this; whether you have a right under your arrangement with U.P. as [55] you put it, under which you do not use what you receive, whether you have a right to use the label "U.P." on that information in General Counsel's Exhibit No. 3 for identification?

The Witness: I cannot answer that because I don't know. We have no contract with them and we have no rights at all for that matter.

Trial Examiner: All right.

(Testimony of C. S. Smith.)

Q. (By Mr. Grodsky): Now, I will show you another article on the same page, headed, "Make Low Bid Pocket Papers on Ohio Town."

A. Now, if you wish me to follow that, as I wouldn't guess at this, I can take it down with me and find out the person who picked it up and find out where it did come from, but anything I tell you now would be a rank guess on my part.

Mr. Grodsky: We will discuss this off the record a little bit later.

Q. (By Mr. Grodsky): But I am calling your attention to this article and ask you if the article, the headline of which I read and it relates at the end "U.P."——

A. Yes, but it isn't a news story. It is a traffic story.

Trial Examiner: Well, I take it you don't know.

The Witness: I have told him so three or four times.

Q. (By Mr. Grodsky): I will show you on page 21 of the same issue a column of three articles headed generally, "Animal [56] Anecdotes" and I ask you if the three articles in question bear the date lines of Richford, Vermont, Washington and Laconia, New Hampshire?

A. Well, you can see by the general story that it would not come in under a news release so it has evidently come from another source, and I can tell you we do not subscribe to this.

Trial Examiner: Do animal stories come from Washington, D. C., by the way?

(Testimony of C. S. Smith.)

Mr. Grodsky: I don't know. It just says "Washington."

The Witness: There are many sources that the girl who writes this could pick it up from.

Q. (By Mr. Grodsky): I am now turning to a document which we will label General Counsel's Exhibit No. 4 for identification and it is the first portion of the Paramount Hollydale edition for October 21, 1954.

And I will ask you if on page 8 of that edition there appears an article "College Coeds Discuss Campus Fashions" with a date line of Berkeley and another date line of Austin, Texas, and at the bottom of the article this legend appears "Written for U.P. by Joyce Williams, University of California, and Patricia Strum, University of Texas."

Is that correct?

A. Yes, you have read it correctly.

Q. Is this the kind of material which you get from the [57] United Press?

A. No, sir, it isn't, not so far as I know. I have never seen anything even similar to it coming in on the United Press letter.

Trial Examiner: That last paper has been identified?

Mr. Grodsky: Yes.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

(Testimony of C. S. Smith.)

Mr. Grodsky: It has been identified as General Counsel's Exhibit No. 4.

Trial Examiner: Thank you. It is with the reporter is it, so that we do not get it confused with the other papers?

Mr. Grodsky: Oh, yes.

Q. (By Mr. Grodsky): Now, your recent panel cartoon features from the Chicago Sun Times Syndicate——

A. I am not sure where we get them. About August, before Mr. Brewer left on vacation I asked him to get some filler material so that instead of having to set type at night when we were late, so that he would have something to fill up the press, and he got it. What he got I don't know. When we are short of something, we can fill in with almost anything.

Q. Well, do you know that you received a cartoon which you used from the Chicago Sun Times Syndicate?

A. I could not answer that, I don't know. [58]

Q. (By Trial Examiner): But who in the company would be able to furnish that information?

A. The only thing I know about it——

Q. I think it is, in a way, unfair to expect you to testify to something that you may not have any detailed knowledge on.

A. The only thing I know about it, your Honor, is that I did ask Mr. Brewer to get some filler material and he informed me that he had ordered some from an agent in Glendale and at that time I

(Testimony of C. S. Smith.)

instructed the editor whenever they were short of a small amount of type, to use filler material, so that we would not have to hold the presses.

Q. The thing I am referring to is this, so that we can have nailed down or nailed out, the question of whether or not, first, you receive filler material from this syndicate and second, about how often it is used and who in the company could furnish that information?

A. I could furnish the information as to how often it is used. We have nine newspapers twice a week, which makes eighteen newspapers and I counted through four weeks of newspapers and found it in three out of the seventy-two papers that there were one or two columns used.

Q. Yes.

A. Well, I believe you will find that is the average.

Q. Were these Chicago Sun Times?

A. I cannot answer that but I believe Mr. Brewer will be able [59] to.

Q. Mr. Brewer will have that information probably?

A. I think he will have but as to where it comes from, I haven't the slightest idea except it was bought from a local man in Glendale and we pay him for it.

Trial Examiner: Go ahead, Mr. Grodsky.

The Witness: And that was only started in September.

(Testimony of C. S. Smith.)

Mr. Kaufman: Your Honor, I have a question I wanted to pose for the record.

Trial Examiner: Certainly.

Mr. Kaufman: The charges originally mention things that occurred in July and August, the newspaper information that is being introduced by the way of exhibits, they are all in September and October.

It seems to me that the exhibits do not support the charges because there are things in them that have arisen since the so-called labor disputes have arisen, and I am wondering whether I should make a motion to strike from the record as to any discussion which supposedly supports things that might have taken place after these so-called charges were made.

Trial Examiner: Do you make such a motion?

Mr. Kaufman: Yes.

Trial Examiner: I will deny the motion. The question of whether the Board has jurisdiction doesn't turn on whether or not within a given time period, certain alleged unfair labor [60] practices occurred.

Now, just for academic reference, the Board has passed on the matter, and I, myself, have passed on the question, but if you want to argue it on your brief, please feel free to do so.

Mr. Kaufman: I just wanted to keep a record of it.

Trial Examiner: Oh, you are perfectly entitled to do that.

(Testimony of C. S. Smith.)

Q. (By Mr. Grodsky): Mr. Smith, I just want to ask you if you did not use the issue of Thursday, October 21, for your comparison, as to how many of these cartoons you used on a certain given date?

A. I don't remember. I think it was prior to that time.

Q. I want to ask you if it isn't a fact, looking at only—let us look at this one cartoon which appears on Thursday, October 21, and I will mark it for identification as General Counsel's Exhibit No. 5.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 5 for identification.)

* * *

Q. (By Mr. Grodsky): From the format at the top of the page, can you tell in how many papers of your chain this [61] particular cartoon ran, the one that I am showing you?

A. No, I cannot. They have some codes up there but I don't know what they are.

Q. Does it mean anything to you that the word "Norwalk," and the word "Bellflower" and the word "Lakewood" and the word "Paramount," and the words "Los Altos" appear at the top?

A. I think that would have to do with the advertisements on the page because we do happen to know that this advertisement appears in these papers.

Q. (By Trial Examiner): Can you tell from

(Testimony of C. S. Smith.)

what locality that particular General Counsel's Exhibit No. 5 was circulated?

A. I couldn't say.

Q. Did you say it was circulated in Norwalk, Bellflower, Lakewood, Paramount and Los Altos?

A. Yes.

Q. Can you estimate with reasonable certainty what the circulation was in that day for these papers in these places?

A. Yes, it would be 29,500.

Q. (By Mr. Grodsky): Would you know whether this cartoon which appears on the page in question, also appeared in the same page in the same location in the other editions, other than the Lakewood and Los Altos, which is the ones we have here?

A. I cannot say unless I examine those papers. You have the papers and if you care to show them to me—— [62]

Q. As a matter of fact, for your information, I do not.

A. I cannot say, but I can say that this will be discontinued at once as we buy this from a man in Glendale.

Q. (By Trial Examiner): I don't think that has anything to do with the issue before us right now. What your business policy is, is something for you to determine.

A. These were only put in as a filler.

Q. The Board has no jurisdiction or interest in

(Testimony of C. S. Smith.)

what items you choose to carry or not carry in the paper.

A. Well, I can put my answer this way. It doesn't add anything to the paper. It has no value to the paper and we can do just as well without it as we can with it, and when we bought it, it was bought from a local man.

Trial Examiner: I will strike the witness' last statement as it isn't responsive to any question asked.

Q. (By Mr. Grodsky): I will ask you whether the same date issues also carry a cartoon on another page which bears the legend at the bottom, "Released by the Bell Syndicate Inc."?

A. That is what it says on here.

Q. Well, it is the same date; is this the same paper? A. Is it the same paper?

Q. I don't know.

A. I don't either. I cannot tell by reading it.

Q. But is it issued on the same date?

A. October 21st on both of them. [63]

Q. And the former one, by the way, we did not identify that, that is Field Enterprises, Inc., is that correct? A. That is what it says.

* * *

Mr. Kaufman: Let me just say this, sir. For instance, [64] on the cartoons, since we do not run a continuity as I understand it, and since they do not necessarily run in all the papers, as I understand it, we do not keep any figures as such that I

(Testimony of C. S. Smith.)

could help him a bit, nor does the company keep any records at all which I could say to, "Our records show that we issue eighteen newspapers a week and in the eighteen newspapers we printed a cartoon twice." We could not help you.

I think that Mr. Smith knows about as much as anybody about this type of operation in that company for this reason, sir, if I may be elucidative?

Trial Examiner: Sure.

Mr. Kaufman: This is an enterprise that is making no attempt to compete with such as the "Times" or anything like that. This is essentially a throwaway having as a means of revenue essentially and only advertising revenue as the pleadings indicate.

We do not attempt to keep any records that would help him. If I could help him or you or Mr. Smith could, why, we would be happy to do so. I can tell you, all I can tell you is that the local news of the little towns is furnished well and adequately covered. The other news like that, I would say that almost nobody would ever read it and I wished I could say that half an hour on this subject would help him but it wouldn't. [65]

I think you have all the information you could possibly get.

Trial Examiner: We have some evidence of this witness that he did count through some seventy-two newspapers and he encountered three in which cartoons were used.

(Testimony of C. S. Smith.)

Mr. Grodsky: That is right.

Trial Examiner: We have some evidence in connection with one of those that the circulation of the particular paper was some 29,500. [66]

* * *

Q. (By Mr. Grodsky): Mr. Smith, do you have with you the records disclosing the names and addresses of all accounts considered as national advertising for the Herald Publishing Company?

A. We do not have such records, Mr. Grodsky.

Q. You have a category of advertising called "national advertising"?

A. I heard the argument this morning and I was more at sea after it was over than when it started. To my knowledge, we have no national advertising.

Q. Mr. Hartwell's position has been manager of national advertising?

A. It was. It has not been for three months and Mr. Hartwell had no national advertising that I know of. He had local accounts which are used to buying, to putting in daily newspapers, as far as I know, we have no national advertising.

It all depends on what your definition of "national advertising" is. [68]

Trial Examiner: I suspect that the witness is right, Mr. Grodsky, so that we can get into the innards of this situation.

The Board has used a phrase, perhaps it is meaningful, perhaps it isn't. Words have no particular charm for me in these proceedings.

(Testimony of C. S. Smith.)

The important question is whether or not the kind of advertising that has been described, by whatever name you call it, call it "X" if you want to, will fill the policy criterion of the Board, laid down by the Board.

If the Board did not visualize "national advertising" as comprehending this and I find it did, and somebody is dissatisfied with what I did, the Board can correct its language or implement it or do whatever it pleases. I do not think the dispute, if there is any, over the words "national advertising" is of much importance.

Mr. Kaufman: Just so that I can crystallize my thinking, in this early stage of the proceeding, do I take it from what you have said that as far as you, the Hearing Officer is concerned, that if advertising as such is for instance, let us take the typical example of the Ford Motor Company, placed by a local merchant in Compton in the Compton newspaper, is it my understanding that you, sir, take the position at this time and until reversed that this, the advertising, is national within the purview, within the [69] meaning of the Board?

Trial Examiner: No, I did not say any such thing.

Mr. Kaufman: No, I know you did not.

Trial Examiner: What I have done is simply to try to get away from the profitless disputes between counsel and a witness or between two witnesses, as to whether the company uses a given term. I think that is unimportant.

(Testimony of C. S. Smith.)

Mr. Kaufman: Right.

Trial Examiner: The important thing is, what do they advertise?

Mr. Kaufman: Right.

Trial Examiner: And as to whether it fits within the phrase of the Board, "national advertising," that is a matter that fits in and perhaps it isn't important. I don't know yet. [70]

* * *

Q. (By Mr. Grodsky): Now, your newspapers have different offices in different localities?

A. We have offices in Compton, Downey, Norwalk, Lakewood, and North Long Beach. Those offices are for limited purposes only with the exception of Compton.

Q. Addressing ourselves now to the office in Lakewood and the period of June, July and August of this year, did you have one or more than one editorial employees there, if you know?

A. I cannot answer that, I don't know.

Q. And who would know that; would it be Mr. Brewer or Mr. Butler?

A. Mr. Butler would probably know.

Q. And would the same thing be true about who were the editorial employees at North Long Beach?

A. Well, North Long Beach has only had one person as long as I can remember at one time.

Trial Examiner: Editorial employees?

The Witness: Yes.

Trial Examiner: What does "editorial employee" mean?

(Testimony of C. S. Smith.)

The Witness: News writer, somebody that writes the news and I think there was only one in Lakewood, but I do not want [72] to state positively because they may possibly have had a society writer operating between Lakewood and Bellflower, but there would only be one news man there at that time. I know there is only one now.

Trial Examiner: Go ahead, Mr. Grodsky.

Q. (By Mr. Grodsky): On the editorial side of the paper during the period now of June, July and August, Mr. Brewer was the general manager at that time?

A. Mr. Brewer was in charge of everything from wall to wall.

Q. And who was directly beneath him on the editorial side?

A. Oh, I think that would be Mr. Butler.

Q. And what was Mr. Butler's title?

A. Managing editor, I think is what we call him. He has been there so long I don't remember what we do call him.

Q. And did Mr. Butler supervise the activities of all of the employees in the editorial side?

A. Generally, yes.

Q. Were there any supervisors who were under him, who, themselves, supervised the activities of the employees?

A. None that have the job of hiring or firing or issuing definite orders. It has to go back to Mr. Butler.

Q. Now, do you know Mr. Cleland?

(Testimony of C. S. Smith.)

A. Jack Cleland?

Q. Yes. A. Yes. [73]

Q. And what was his title during the same period?

A. Editor or head news man for the Lynwood paper and he is city editor of the Compton paper. He has a dual job.

Q. Does he have a staff of reporters who work under him? A. None whatever.

Q. Are there any other reporters who work on the Compton paper?

A. We have some girl that handles police reporting.

Q. Is she a reporter?

A. Well, we will call her an editorial employee. We are not big enough to have specialized jobs.

Q. Do you have any other employee who has a reporting or editorial job in the Lynwood paper?

A. None in the Lynwood paper. The society editress from Compton may cover some of the social functions of the Lynwood community, but even that, I am not sure of.

Trial Examiner: Would you classify her as an editorial employee, too?

The Witness: Yes, your Honor, they are all more or less general purpose editorial writers.

Q. (By Mr. Grodsky): Would she take instructions from Mr. Cleland?

A. No, she takes it from Mr. Butler.

Q. Was there an employee by the name of Tony Derry in July and August? [74]

(Testimony of C. S. Smith.)

A. Yes, he took Mr. London's place in North Long Beach.

Q. Before he took Mr. London's place in North Long Beach, was he employed by the company?

A. Oh, yes.

Q. Where was he working?

A. I think at that time out of Compton as police reporter or as general feature writer.

Q. To whom did he report?

A. Mr. Butler.

Q. He didn't report to Mr. Cleland?

A. Oh, no, Mr. Cleland was nothing but an editorial man himself.

Q. Did Mr. Cleland, to your knowledge, assign Tony to do any specific reporting jobs?

A. Oh, no, he has no authority. Mr. Cleland is a reporter and a city editor and anything he would tell somebody else to do, well, they would not have to do it if they did not want to, because he has no authority.

Trial Examiner: Well, what does a city editor do?

The Witness: Well, with us, your Honor, it is more or less just a title when he goes before the various business clubs to speak or to report meetings. He is then introduced as the city editor.

A number of years ago we gave these people various titles or they took them themselves. The first time I knew that Jack [75] was the city editor was when I saw it on the masthead of our own paper.

(Testimony of C. S. Smith.)

Q. (By Mr. Grodsky): Do you have an employee by the name of Don Desfor? A. Who?

Q. Don Desfor. A. John Desfor?

Q. No, D-o-n Desfor?

A. I do not recognize the name.

Q. You had an employee by the name of Doris Zerby?

A. No, I do not recognize her. She might possibly be the police reporter. They have some girl that is the police reporter.

Q. My information is that she is the police reporter. A. What was that?

Q. My information is that she is the police reporter.

A. Well, that is the only one I can think of that it would fit.

Q. Has Mr. Cleland ever come to your home to discuss Herald American business with you?

A. A lot of reporters come to my home at various times to discuss feature stories. My office is my home. I do the bulk of my business at my home. That is what I answered, do you remember, when you asked me if my office was in the Herald Publishing Company and I said "no." [76]

Mr. Butler, Mr. Cleland, Tony, they all come to my home.

Q. Did Mr. London ever come to your home to discuss business?

A. Yes, after he had been discharged to discuss why he had been discharged. Mr. Butler was there when he came.

(Testimony of C. S. Smith.)

Q. Prior to the discharge, did he ever come to your home to discuss business?

A. Not that I remember. I did not even know Mr. London by sight.

Q. Now, you mentioned Mr. London's discharge, do you know who made the decision to discharge Mr. London?

A. The final decision was Mr. Butler's after referring it to me.

Trial Examiner: You mean he made the decision after he referred to you?

The Witness: Mr. Butler came to me and said he had a man at Long Beach office who was constantly out or away from the job without permission.

Trial Examiner: That wasn't the question I asked you. I will strike the answer you gave. What I meant was in terms of time, did Mr. Butler make the decision after he referred the matter to you or did he make the decision before it was referred to you?

The Witness: That I cannot answer. I started to tell you exactly what happened, that he told me at——

Trial Examiner: No, I do not want that, but if you are [77] unable to give it to me it is all right.

The Witness: I don't remember whether it was before or after.

Trial Examiner: All right. Mr. Grodsky?

(Testimony of C. S. Smith.)

Mr. Grodsky: Counsel, can we stipulate that the date of discharge—well, can we stipulate as to the date of discharge? I thought it might be of help to the witness.

Mr Kaufman: The date of the discharge I do not think we will have any trouble with it at all.

Mr. Grodsky: It is July 17th.

Mr. Kaufman: I did not deny it.

Mr. Grodsky: I didn't know whether you did or not.

Mr. Kaufman: Well, if you tell me it is the 17th, this is one stipulation I need no authority for and I will say it is the 17th.

Mr. Grodsky: It was just to help me along.

Mr. Kaufman: Sure, let us take that as your date.

Q. (By Mr. Grodsky): How long before the date of Mr. London's discharge were you made aware by Mr. Butler of the difficulty with Mr. London?

A. Two to three weeks prior is my recollection. Between two or three weeks on different occasions he said that he had a man in the North Long Beach office that wasn't on the job and if he did not change and buck up, he was going to have to get rid of him. [78]

My reply to Mr. Butler was, "It is your department. You have to keep order in your own house."

My further comment was that I did not think that the Long Beach paper was quite representative of the Herald American group and I called attention to one or two articles where there had been evi-

(Testimony of C. S. Smith.)

dence, where not even the name of the person or the location of the accident was given.

* * *

Q. (By Mr. Grodsky): Did you have more than one discussion with Mr. Butler about Mr. [79] London?

A. My recollection is that there was more than one.

Q. Beginning about when and about how many discussions and about how were they spaced?

A. Oh, I don't remember.

Q. Well, you did try to give us an indication. You said Mr. Butler complained to you about two or three weeks before.

A. Well, his Honor cautioned me to be careful in answering and I am trying to do that. I don't remember exactly. It was some days before.

Q. Well, I take it now it was some days before the discharge that Mr. Butler spoke to you about his being dissatisfied with Mr. London's performance?

A. Yes, I have answered that three or four times.

Q. When you say, "some days," what is your best estimate of the first time that Mr. Butler mentioned it to you?

Mr. Kaufman: Now, aren't we getting a little bit repetitious? He said it was about two weeks or so.

(Testimony of C. S. Smith.)

Trial Examiner: Yes, he has answered that already.

Mr. Grodsky: All right.

Trial Examiner: He mentioned several times within a period of a few weeks that the conversation arose.

Q. (By Mr. Grodsky): Now, did Mr. Butler tell you before he actually discharged Mr. London that he was going to discharge him?

A. No, I told you before he said, that unless the man in [80] North Long Beach picked up, did a better job and stayed on the job, he was going to have to get rid of him.

Q. Now, after Mr. London was discharged—well, strike that—do you know anything about the circumstances surrounding the discharge of Ray Ross? A. Only generally.

Q. Who made the decision to discharge Ross?

A. I think he was discharged on a seniority basis if my recollection is correct.

Trial Examiner: The question is, who made the decision to discharge him; do you know that?

The Witness: What actual official?

The Examiner: Yes.

The Witness: I do know he discharged nine or ten on one day and I don't know who made the decisions in each case. There was a general meeting of all executives and they were told to cut down the force.

Trial Examiner: I am going to cut down every-

(Testimony of C. S. Smith.)

thing but the witness' statement that he doesn't know who made the decision. [81]

* * *

Q. (By Mr. Grodsky): Mr. Smith, in response to the subpoena, have you brought in the item No. 5 consisting of the payroll records, disclosing names and classifications of all editorial employees, classified advertising personnel, PBX operators and cashiers, after March 1, 1954?

A. I think the records are here.

Mr. Kaufman: The answer to that is "yes." [83]

* * *

Q. (By Mr. Grodsky): Mr. Smith, what was the title of Mr. William Sheets, if you know?

A. I think in an ordinary newspaper, Mr. Sheets would be called a "rewrite editor."

Q. Now, on the old, former Exhibit No. 6, he is listed as "division editor"?

A. Well, it means the same thing. Say, for instance, if you have the same news in five zones, why write it up five different times?

Q. Where was his office? A. Compton.

Trial Examiner: Do I understand that the term "division" would include a certain number of zones; is that it?

The Witness: The term of the title, your Honor, that is his duties. He has no hiring or firing to do of any kind. You see, these little communities are pretty close together. [87] Some of the news fits them all, some of it only one and it is his job to

(Testimony of C. S. Smith.)

coordinate and formulate, so that there is as little repetition as possible.

Q. (By Mr. Grodsky): Mr. Smith, was there a time when Mr. Sheet's office was in Lakewood?

A. I don't think he was ever in Lakewood. I think he was in Bellflower.

Q. Well, when he was in Bellflower, what did his job consist of?

A. I think the same thing.

Q. Did he have any supervision over any of the men in these offices which were in his division?

Mr. Kaufman: Well, now, just a moment, just to keep the record—I don't know how far you want to go.

Mr. Grodsky: I will withdraw that question. You are completely right. It just skipped me.

Q. (By Mr. Grodsky): Do you know when Mr. Sheets was in Bellflower?

A. The early part of this year, I think.

Q. Well, when Mr. London was discharged, who was put in charge of the North Long Beach office?

A. This Tony, that is my recollection of it.

Q. When Mr. Ross was discharged, who was made the editor at Lakewood? A. Tony. [88]

Q. And who took over at North Long Beach then? A. Oh, Fleener.

Trial Examiner: Have we a first name on that?

The Reporter: No, sir.

The Witness: Oney.

Q. (By Mr. Grodsky): Now, do you know

(Testimony of C. S. Smith.)

whether Mr. Sheets was still at Bellflower when Mr. London was fired?

A. I cannot answer that, I don't know.

Q. His work involved the make-up of the various papers within a certain group; is that correct? A. You mean, Mr. Sheets?

Q. Yes.

A. He is in charge of coordinating the news in the papers.

Q. For which papers?

A. Any and all of them.

Q. I am talking now of the time he was at the Bellflower office? A. I don't know.

Q. Who would be the one who would know his job at that time?

A. I haven't the slightest idea unless Mr. Butler would. He was engaged in the same general job that he has now. He was just moved from one office to another, if that is what you want to know.

Q. Is Leonard Lugoff a supervisor?

A. Leonard Lugoff is in charge of the classified advertising. [89]

Q. Does he have the authority to hire and discharge employees? A. He does.

Q. Does Mr. Murray have the authority to hire and fire employees?

A. Only by referring to me.

Q. What do you mean by that?

A. Just what I say.

(Testimony of C. S. Smith.)

Trial Examiner: Well, I suspect that counsel has something in mind about which there may be some doubt. Let me put it this way.

Was he vested with any power or authority to make recommendations to you for hiring or discharging?

The Witness: Well, he could make recommendations but the decision rested with me.

Trial Examiner: Had you ever acted on his recommendations?

The Witness: Yes, on a few occasions.

Trial Examiner: Accepting them?

The Witness: I have used them on some occasions and sometimes I have rejected them.

Trial Examiner: Were these recommendations for hiring or for firing?

The Witness: Both.

Trial Examiner: And I take it you have both accepted [90] and rejected recommendations for both hiring and for firing?

The Witness: That is correct.

Q. (By Mr. Grodsky): What title does Mr. Murray have?

A. Salesman at the present time, I think.

Q. What was his title in June and July of this year? A. I think the same.

Trial Examiner: While we are on this subject, would you go back if you can, to the last time when this gentleman recommended that somebody be discharged. Do you remember such an incident?

(Testimony of C. S. Smith.)

The Witness: Recommended a discharge?

Trial Examiner: Yes.

The Witness: About within the last two weeks.

Trial Examiner: Did you discharge the individual concerned?

The Witness: He recommended two people. We discharged one and transferred one.

Trial Examiner: Did he recommend that both be discharged?

The Witness: I don't think there was any flat recommendation in either case. He was just laying the facts before me.

Trial Examiner: Do I understand he made no recommendations to you?

The Witness: Not an out and out recommendation.

Trial Examiner: Did he make a recommendation that [91] anything be done with specific reference to the matter?

The Witness: He said that something should be done in both of these cases.

Trial Examiner: Were these people who were associated with him in work in any way?

The Witness: Yes, they were both in the sales department.

Trial Examiner: And what connection did he have with their work if any?

(Testimony of C. S. Smith.)

The Witness: He generally accepts my orders on laying out work for them and advertising campaigns to be put on.

Trial Examiner: Well, after receiving his orders, what was his function with respect to these two employees?

The Witness: Well, concerning these two employees, it had come to his attention that one of these was collecting monies and not turning them over and that had occurred over a long period of time, so that employee was terminated. We gave him one week's pay in lieu of notice.

The other one was a man who had been transferred to another territory and he wasn't making good in the territory where he had been previously working, so we moved him back to where he was before.

Trial Examiner: Why was it that this gentleman who made this recommendation to you that something should be done, why was it that he made the recommendation rather than somebody [92] else?

The Witness: Because he is, more or less, my contact man on the deal. He is fairly familiar with the whole operation.

Trial Examiner: Did you regard it as any part of his duties to make such recommendations to you?

The Witness: Shall we say as the head salesman. He isn't the sales manager though.

Trial Examiner: I would take it that that is what a sales manager would be?

(Testimony of C. S. Smith.)

The Witness: Head salesman.

Trial Examiner: And in these cases when the titles are not decisive, it is what the people do, that is why I am trying to find out the relationship between this gentleman and the two employees and between him and you.

The Witness: Sure.

Trial Examiner: Now, had there been any occasion before this when he had made any recommendations to you in words or substance, for some particular course of conduct with respect to an employee who was associated with him at work?

The Witness: He has made recommendations at various times that we employ certain people and I have found him a very good judge of people, and I have O.K.'d practically everyone that he has wanted to employ when we had vacancies.

Trial Examiner: And were these vacancies, jobs in some [93] way that were associated with his work?

The Witness: With the sales department.

Trial Examiner: With the sales department?

The Witness: That is right. He has no contact whatever with any other department.

Trial Examiner: Go ahead, Mr. Grodsky.

Mr. Grodsky: Thank you.

Q. (By Mr. Grodsky): Do you have an employee by the name of Bob Clark?

A. Bob Clark is, shall we say, the head salesman for the Lakewood office.

Q. Does he have any specific title?

(Testimony of C. S. Smith.)

A. I would have to look at the Lakewood Herald American and see what he calls himself. I believe he calls himself the general manager of the Lakewood Herald American.

Q. Are there any other employees in the Lakewood office? A. Oh, yes.

Q. What employees are there in the Lakewood office?

A. Well, they have the circulation man and they have two other salesmen and the classified advertisment girl.

Q. And do any of these employees take instructions from Mr. Clark?

A. The salesmen do and he is also responsible for the general routine of the office. In other words, someone who is under someone else will be reporting to the head of that department in the main office, if they are constantly late or [94] do not do their work, but as to correcting them or hiring and firing he doesn't have the power.

Trial Examiner: Well, has he made recommendations with respect to hiring and firing ?

The Witness: Frankly no. He has only had the new job, your Honor, for the last three weeks.

Trial Examiner: I see.

Q. (By Mr. Grodsky): Now, before that time, what was his title if you know?

A. Before that time he was manager of the Lakewood Herald American which consists of himself and one salesman and one classified girl, one

(Testimony of C. S. Smith.)

sales girl and one circulation man but he had no authority ever to watch their work.

He was elected a member of the Chamber of Commerce out there so we gave him a higher sounding title.

Trial Examiner: I see.

The Witness: And when we found out that people were taking advantage——

Trial Examiner: You found people were taking advantage, and what did you do?

The Witness: I discharged one of them and then I put in a rule that he would be responsible for seeing that they were on the job at the time they were supposed to get there in the morning and did a reasonable amount of work during the day.

Trial Examiner: And what do you expect that he would do [95] if he observed that somebody wasn't on time or doing their work?

The Witness: Then his job would be to report it to the head of that department. If it were an editorial employee, he would report it to Mr. Butler. If it were a classified advertisment employee, he would report it to Mr. Lugoff, and if it were a circulation employee, he would report to that department.

Trial Examiner: Well, is there anybody in that office who has the responsibility of telling an employee to perform a given function?

The Witness: Only his sales force, I mean his display advertising force.

(Testimony of C. S. Smith.)

Trial Examiner: And that consists of how many people?

The Witness: Two people.

Trial Examiner: And would he have that responsibility before he was elevated to the managership?

The Witness: Yes, he did but he was only exercising it in a perfunctory manner.

Trial Examiner: Go ahead, Mr. Grodsky.

Q. (By Mr. Grodsky): Who determines the matter of wage increases for the editorial employees? A. I didn't hear you, pardon me.

Q. Who determines the matter of wage increases for the editorial employees? [96] A. I do.

Q. Do you have any policy about wage increases for editorial employees?

A. The only policy is this; we try to pay them as much as they are worth and as much as we can afford to pay them, and and keep up with the going wage.

Q. Now in this exhibit that has been withdrawn, there was some data about wage increases that were given in July of 1954. I notice that you examined that data in the exhibit. Now, was that data incorrect?

A. The reason I told you that that data was incorrect is that it did not go back far enough and gave a very distorted showing of wage increases and what I wondered—well, I wanted to—what I wanted to do was to go back and show you and the court just exactly what the wage policy had been.

(Testimony of C. S. Smith.)

Q. Insofar as that document indicated that there were a substantial number of increases, we will not go into the reasons yet. A. All right. [97]

* * *

Cross-Examination

By Mr. Kaufman:

Q. Mr. Smith, you testified, I believe, that you had 142,000 circulation approximately and then I believe you later on corrected this figure downward a little on the basis that you did not have quite as many on Sunday, I believe, as on Thursday?

A. That is correct.

Q. So then, what would be the total circulation?

A. We put more into Downey to make up for the Paramount division.

Q. What would it run about?

A. Oh, about 120,000. [99]

Q. So we would be right in assuming that it would be between 130,000 and 140,000 in that vicinity? A. That is right.

Q. Now actually sir, are those papers paid for by subscription? Do you sell them on the streets like the "Times" or the "Herald"?

A. Well, Mr. Kaufman, I can only answer that by explaining the way we do business.

Q. Well, please do, sir.

A. We have what we call the "little merchant system" and we start out by giving the papers to

(Testimony of C. S. Smith.)

any carrier, anywhere from eighty to two hundred, and they endeavor to collect for these papers.

The carrier gets a guarantee in addition to 15% I think. We probably collect only 30% to 40% of the circulation.

Trial Examiner: And who are those people not buying any, are they householders?

The Witness: Various citizens that we address the papers to. We take districts, your Honor.

Trial Examiner: All right.

Q. (By Mr. Kaufman): Now, your business is local citizens, it doesn't deal with the out of state?

Mr. Grodsky: I will stipulate to that.

Mr. Kaufman: All right, I will accept the stipulation. We have covered that by stipulation. [100]

The witness: Yes.

Mr. Kaufman: Your Honor, if I may interrupt, am I correct in stating that I am now in cross-examination and if I so desire I may ask the witness questions on direct later by calling him myself?

Mr. Grodsky: Yes.

Trial Examiner: You certainly can. I will free this witness of implication as a so-called adverse witness under the rules of civil procedure applicable to the District Court Rule 436.

Mr. Kaufman: As an adverse witness?

Trial Examiner: Yes.

Mr. Kaufman: All right.

Trial Examiner: And you may call him, of course.

Mr. Kaufman: I have no further questions.

(Testimony of C. S. Smith.)

Redirect Examination

By Mr. Grodsky:

Q. Do you have some newsstand sellers of your papers? A. Pardon?

Q. Do you have some newsstand sellers of your papers? A. Can I explain that?

Q. Surely.

A. I cannot answer it "yes" or "no." We have quite a number of stands around and we will put twenty papers but get back a dime if we are lucky. Either somebody doesn't put the money in [101] or they steal the money before we can get to it.

Q. Do you have any sales through cigar store counters and drug stores?

A. We may have one or two in the whole chain. I can think of one only.

Q. Do you have sales that are through your offices?

A. If people come in and ask for the papers we sell them for ten cents.

Mr. Grodsky: No further questions.

Trial Examiner: Anything else, Mr. Kaufman?

Mr. Kaufman: No further questions.

Q. (By Trial Examiner): Mr. Smith, this gentleman concerning whom you used the word "perfunctory" before, what was his name?

A. Was that the sales manager?

Q. Yes. A. That is Mr. Lou Murray.

Q. Now, without reference to the term "per-

(Testimony of C. S. Smith.)

functory," will you tell me what he does in relation to the other sales personnel in the office?

Mr. Grodsky: May I interrupt, Mr. Examiner, you are referring to Mr. Clark in the Lakewood office, not to Mr. Murray who is the sales manager, I believe.

Trial Examiner: Well, I will find out in a moment.

Q. (By Trial Examiner): There was a gentleman whom you said [102] before had been made president of the Chamber of Commerce?

A. Oh, director of the Chamber of Commerce. That is Mr. Clark.

Q. Now we have the man identified. Now, to go back to the sales people in the office; what does he do in relation to them if anything?

A. Up until last week, your Honor, all he did was he was supposed to supervise them and would make out lists of certain customers and he allocated certain customers to certain salesmen.

Q. When you say he was "supposed to supervise," what was it that he was supposed to do in terms of supervision?

A. Well, can I explain it?

Q. Yes.

A. Mr. Clark is our top salesman in the amount of accounts and dollars and he is so busy himself that he was neglecting to outline the work for the other salesmen.

So last week we called him in and made complete lists of all customers in that district and told him

(Testimony of C. S. Smith.)

to allocate certain customers to certain salesmen and then he was responsible for seeing that those customers were called on.

That was brought about because we found that certain customers were not being called upon at all by anyone so we further outlined the duties of his office and gave him those lists so that he could handle it himself in addition to his [103] other duties.

Q. Now, is it your testimony that he completely failed prior to last week, to discharge that responsibility or is it your testimony that he did not discharge it enough?

A. All I can say is that I think on considered judgment on it, he was doing his own work and was working all sorts of hours and a top man in an organization like that has to work hard, but he wasn't paying enough attention to the people he had to direct.

Q. Well, what attention did he pay?

A. Well, very frankly, I don't think he was paying much attention. He didn't have his list of the customers, that is, his sales lists and he did not check with the salesmen as to what they had sold.

Q. Now, during that period would he give any of these sales people names and addresses of customers? I am not now referring as to whether he did the duties well or poorly. I am just referring to the question, did he do it?

A. Yes, he did some of it. There was one group called the "Faculty" job. He had one man take

(Testimony of C. S. Smith.)

over when he could not handle it. That is the only specific case that I know of where he actually paid attention to the man who worked with him, whose work he was responsible for.

As it is now, he has complete lists for each salesman so now he is responsible for seeing that they call on all [104] customers on his list.

Trial Examiner: Anything more from this witness?

Mr. Grodsky: Just one or two questions.

Q. (By Mr. Grodsky): Again dealing with Mr. Clark, on General Counsel's Exhibit No. 5 for identification, on the second page near the bottom is the masthead—which I believe is what it is called in the trade—— A. Yes.

Q. Of the Lakewood-Los Altos Herald American, and it lists the following personnel, Colonel C. S. Smith, president and publisher; Ralph J. Brewer, vice president; Warren W. Butler, managing editor; Robert Clark, general manager.

A. But you will notice that there is a line between Mr. Butler and Robert Clark.

Mr. Grodsky: That is correct. Louis M. Murray, sales manager; W. L. Sheets, division editor.

The Witness: That is right.

Q. (By Mr. Grodsky): Is that correct?

A. Yes.

Q. And that is for the issue of October 21, 1954?

A. Yes. Mr. Clark was given that title some time in October when he was elected to the Board of Directors of the Chamber of Commerce.

(Testimony of C. S. Smith.)

Q. I will show you General Counsel's Exhibit No. 7 for identification, being a copy of the Lakewood-Los Altos [105] Herald American, for Thursday, 16th September, 1954, and ask you if the masthead on that date did not list these people; Colonel C. S. Smith, publisher; Ralph J. Brewer, general manager; Louis M. Murray, sales manager; M. Robert Clark, local manager; W. L. Sheets, division editor; Tony Derry, editor?

A. Yes, that is what I told you in my testimony.

Q. And certainly on this one, since you mentioned it, there appeared to be a line, I will ask you if you can see if there is a line at any point between any of those names?

A. No, that was the lineup at that time but it changed after that. Mr. Brewer was on vacation and he had just taken off. [106]

* * *

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 6 and was received in evidence.) [113]

GENERAL COUNSEL'S EXHIBIT No. 6

(Copy)

Herald Publishing Company of Bellflower
Employment Record

5. The payroll records disclosing names and classifications of all editorial employees, classified

advertising solicitors, PBX operators, and cashiers on and at all times after March 1, 1954.

Editorial

Jack Cleland, City Editor
W. L. Sheets, Division Editor
Oney Fleener, Home & Garden Editor
Jean Julley, Norwalk Editor
Lawrence Moshier, Bellflower Editor
John Echeveste, Reporter
Helen Farlow, Society Editor
Sol London, Long Beach Editor
Jerome Syverson, Downey Editor
Doris Zerby, Reporter
Anthony Derry, Reporter
Mary Jo Clements, Magazine Editor
Norma Montgomery, Reporter
Marion Mattison, Society Editor
Barbara Heath, Society Editor
William Edmond, Reporter
Howard Handy, Sports Editor
Maxine Galt, Society Editor

Cashiers and PBX

Ellen Bettler, General Cashier
Erma Whertley, Cashier and PBX
Beatrice Kirchner, Cashier and PBX
Patricia Miller
Doris Farley, Cashier, PBX
Fayette Petty, PBX

Classified

Leonard Lugoff, Classified Manager
Robert Raschdorf, Classified Sales
Franklin Marshall, Classified Sales
Dorothy Bush, Classified Sales
Dorothy Holt, Classified Clerk
Virginia Streeper, Telephone Sales
Andrea Olson, Telephone Sales
Ruth LaFave, Telephone Sales
Elizabeth Herb, Telephone Sales
Dale Neumann, Telephone Sales
Marie England, Telephone Sales
Barbara Baker, Telephone Sales
Katherine Grant, Telephone Sales
Virginia Fletcher, Classified counter girl
Bertha Reid, Telephone Sales
Gloria Hickey, Telephone Sales.

6. Name and date of employment of all editorial employees employed after March 1, 1954.

Raymond Ross, March 22, 1954, to Aug. 17, 1954
Donald Desfor, May 29 to Sept. 4, 1954
Maxine Galt, July 30, 1954
Arnold Collins, Aug. 9, 1954, to Aug. 17, 1954
Don Widener, Sept. 2, 1954
Earl Griswold, Oct. 11, 1954

7. Name and date of termination of all editorial employees terminated after July 1, 1954.

Sol London, July 16, 1954
Helen Farlow, July 29, 1954

Raymond Ross, Aug. 17, 1954
Arnold Collins, Aug. 17, 1954
William Edmond, Aug. 18, 1954
Donald Desfor, Sept. 4, 1954
Maxine Galt, Sept. 16, 1954
Oney Fleener, Oct. 11, 1954 (transferred to Advertising Dept.)

8. Name and date of employment of all classified advertising solicitors employed after March 1, 1954.

Mary VanAllen, March 29, 1954
Gloria Hickey, April 12, 1954
Patricia Beck, May 25, 1954
Dorothy McGuire, July 12, 1954
Edith Zink, July 13, 1954
Lucille Pfershy, July 14, 1954

9. Name and date of termination of all classified advertising solicitors terminated after August 1, 1954.

Gloria Hickey, Aug. 17, 1954

10. Names and date of employment of all PBX operators and cashiers after June 15, 1954.

Marion Cronk, June 28, 1954—From part-time to full-time 8/30/54
Doris Farley, June 28, 1954
Fayette Petty, Sept. 1, 1954

11. Names and dates of termination of all PBX operators and cashiers after Aug. 1, 1954.

Doris Farley, Aug. 17, 1954

Helen Larson, Aug. 27, 1954

12. A list of all pay increases and bonuses given to editorial employees and classified employees from July 1, 1954, to date, listing the name of employee, date of increase or bonus and amount of increase or bonus.

Marion Mattison, July 8, 1954, $10.00
Jack Cleland, July 18, 1954, $15.00
William Sheets, July 18, 1954, $15.00; 8/22/54, $25.00
Jean Jolley, July 18, 1954, $10.00
Raymond Ross, July 18, 1954, $5.00
Laurence Moshier, July 18, 1954, $5.00; Aug. 29, 1954, $10.00
John Echeveste, July 18, 1954, $5.00; 8/22/54, $10.00
Doris Zerby, July 18, 1954, $10.00
Elaine Marable, July 18, 1954, $10.00
Jerome Syverson, July 18, 1954, $15.00; Aug. 29, 1954, $5.00
Anthony Derry, July 18, 1954, $10.00; Aug. 29, 1954, $5.00
Mary Jo Clements, July 18, 1954, $10.00
William Edmond, July 18, 1954, $15.00
Helen Farlow, Oct. 24, 1954, $5.00

Received in evidence December 6, 1954.

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* * *

MAXINE GALT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you state your name and address, please?

A. Maxine Galt, 14633 Atlantic, Compton.

Trial Examiner: What is your last name?

The Witness: Galt.

Trial Examiner: G-a-l-t?

The Witness: Yes. [116]

Q. (By Mr. Grodsky): Mrs. Galt, were you employed by the Herald American during the period of June, July and August of this year?

A. Yes.

Q. In what capacity?

A. Well, part of the time on the copy desk and then I was put on editorial for awhile.

* * *

Q. (By Mr. Grodsky): Mrs. Galt, during the time that you were working at the Herald American, did you have occasion to learn that the Newspaper Guild was conducting an organizational drive?

Mr. Kaufman: Off the record. Counsel, would you please speak up a little louder, too.

Mr. Grodsky: All right.

The Witness: Yes, I did.

(Testimony of Maxine Galt.)

Mr. Kaufman: What was the last question and answer? Would you read it Miss Reporter, please? [117]

(Question and answer read.)

Mr. Grodsky: I will now have this document marked General Counsel's Exhibit No. 8 for identification.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 8 for identification.)

Q. (By Mr. Grodsky): I show you a document, General Counsel's Exhibit No. 8 for identification, being a copy of a four-page newspaper in tabloid size, headed, "Los Angeles Guildsmen" and dated Friday, July 9, 1954, and I ask you if you have at any time previously seen a copy of this issue of the paper? A. Yes.

Q. To the best of your recollection, when was the first time that you saw that issue?

A. Shortly after it came out.

Q. And did you have occasion to discuss that issue with any reporters of the—with any representative of the Herald American? A. Yes.

Q. With whom did you have such discussion?

A. Mr. Cleland.

Q. And where did this discussion take place?

A. In the Compton office.

Q. Was any one else present? A. No.

(Testimony of Maxine Galt.)

Q. At what time of the day was it, do you recall? [118] A. I don't remember.

Q. And what is your best estimate as to how long after the date of that issue that you had that discussion with him, if you have any idea on that subject?

A. Well, probably the following week, as far as I can remember.

Q. Do you know what day of the week?

A. No, I don't remember. [119]

* * *

Q. (By Mr. Grodsky): At the time in question, that is July of 1954, were you working in the Compton office? A. Yes, sir.

Q. And Mr. Cleland was working at the Compton office? A. Yes.

Q. What was your job at that time?

A. Society editor at the time.

Q. Were there any employees in the office known to you to be reporters? A. Yes.

Q. Who were employed at that time as reporters, if you recall?

A. Doris Zerby, I believe that is her name, and Don—I don't remember his last name any more.

Q. Is it Don Desfor? A. Yes, sir.

Q. Do you recall an employee by the name of Tony Derry? A. Yes.

Q. Was he a reporter? A. Yes, sir.

Q. Was he working there at that time?

A. I am not sure if he was working down at the Compton office at that time or not.

(Testimony of Maxine Galt.)

Q. To whom did these employees, Doris Zerby and Don Desfor [120] report, if you know?

A. I don't know to tell you the truth.

Q. You don't know? A. No.

Q. Do you know what the duties were of Mr. Cleland?

A. Well, city editor, as far as I understood it.

Q. Well, did you observe what he does as city editor? A. Just how do you mean that?

Q. Well, did you observe whether or not he gives assignments to reporters?

A. Yes, sir, I believe he did on occasions.

Trial Examiner: Well, let me ask you this. I assume there are "city editors" and "city editors." Having seen a play called "Front Page," I don't think there is a city editor such as they dreamed up there, but what did this city editor do, outside of having a title? Tell us what you saw him do, not what you heard.

The Witness: Well, outside of the handling of news items, I really did not see much, because I didn't pay much attention. I was busy in my own quarter of the office and stuck very much to my own business there.

Trial Examiner: I take it you are saying you don't know?

The Witness: That is right. [121]

* * *

Q. (By Mr. Grodsky): Do you know Ray Ross?

A. Yes.

(Testimony of Maxine Galt.)

Q. Did you know him when he was employed by the company? A. Yes.

Q. After his termination, did you have any conversation with any representative of management, concerning Ray Ross? A. Yes, sir.

Q. With whom did you have such conversation?

A. Mr. Clark. [122]

Q. And where did the conversation take place?

A. At the Compton office.

Q. About how long after Mr. Ross' termination did it take place?

A. Well, as near as I can remember, it must have been a week or two afterwards, possibly two weeks.

Q. Now, was anyone else present when this conversation took place? A. No.

Q. What did Mr. Clark say to you and what did you say to Mr. Clark on this occasion?

Mr. Kaufman: Again I am going to object. I know that there was a little different evidence in regard to Mr. Clark than there was in regard to the other witnesses. I do not think there was enough evidence solicited to show that Mr. Clark was a supervisory employee with the power to fire Ray Ross.

And I submit that such a conversation would be hearsay and a violation of the rule. I am very well aware of the court's interrogation regarding Mr. Clark and his duties and his job and Mr. Smith in connection with it and I do not think that

(Testimony of Maxine Galt.)

establishes a supervisory employee within the meaning of the Act.

Mr. Grodsky: Well, I will rest on the status of the record so far as his supervisory status is concerned.

Trial Examiner: What is your recollection of it? [123]

Mr. Grodsky: My recollection is that he definitely supervised the activities of two of the salesmen who were working under him and in addition to that, he was the only person in the isolated office where he was working, who had any kind of supervisory authority at all.

Many of the other employees were supervised by remote control. He was the only person with a supervisory status there.

Trial Examiner: If I understand clearly, there was a breakdown date, as it were, and he had substantially the same duties before and after that date, but with a loose assemblage of duties before the date.

The witness testified that he was performing the duties to some extent. These duties, if I recollect correctly, constituted all the assignments of customers to be called on.

Mr. Grodsky: Well, also the matter of seeing that the office was run. Now there is no doubt about his title. His title was local manager. Now, the fact that he did not choose to assert his authority doesn't change the fact that he had the authority

(Testimony of Maxine Galt.)

and the employees there knew that he had the authority.

Trial Examiner: All right. Well, do you propose, not in terms, but under this 8 (1) or would it be a statement by Mr. Clark with reference to a reason for termination?

Mr. Grodsky: Neither. [124]

Trial Examiner: Neither one?

Mr. Kaufman, in these cases, depending upon the statement involved, it isn't always true that there must be a supervisory status as a condition to be received for a conversation. It may be that there has been a holding out. There are numerous cases in which individuals not specially authorized who may work in various kinds of positions, close to management, such as confidential clerks—I am just reaching out for an example—identified in the minds of employees with management, as for example, sometimes people may have managerial titles with the consent of the management and it is because of the apparent supervisory authority that these statements become permissible.

I had not asked Mr. Grodsky to make a showing because of the presence of the witnesses, but I have enough from him against the background of what has been said about Mr. Clark, definitely to receive the conversation.

I am going to overrule the objection. I don't know what the conversation is yet. That may turn out to show that Mr. Clark isn't competent to say whatever he did say.

(Testimony of Maxine Galt.)

Mr. Kaufman: Before you make your ruling final, will you permit me to make a statement?

Trial Examiner: Sure.

Mr. Kaufman: If the court please, I well understand the court's statements but I do feel that I would like to take [125] this witness on voir dire pertaining to the background that you spoke about, in order to clarify the record.

Trial Examiner: Will that be with respect to Mr. Clark?

Mr. Kaufman: Only with respect to Mr. Clark on apparent or alleged authority.

Mr. Grodsky: I will object to that.

Trial Examiner: She did not testify to that.

Mr. Kaufman: She, however, according to the statement made to the court, must have had some knowledge or she must have had some holding out. I submit that the record taken as a whole, clearly indicated that this man was not a supervisory employee within the meaning of the Act.

I suggest that a conversation between Mr. Clark and this witness, who, incidentally, worked in a different office than Mr. Clark, pertaining to another man is completely hearsay and I do feel that a few questions for the record might establish this fact.

Trial Examiner: Well, if I recollect clearly it isn't on her testimony that foundation is based for Mr. Clark's duties. I am going to overrule the objection to this testimony.

Q. (By Mr. Grodsky): Will you tell us what

(Testimony of Maxine Galt.)

Mr. Clark said to you and what you said to Mr. Clark?

A. Mr. Clark made the remark that Ray Ross had gone to work wearing a union button. Mr. Clark said he had called Mr. [126] Smith and said he would not work with any union member and that if he did not fire him that he would quit.

Mr. Grodsky: I have no further questions at this time.

Mr. Kaufman: I want to make a motion now to strike that conversation from the record on the ground that there was insufficient foundation laid, that it is a hearsay conversation and actually does go further than General Counsel had indicated that it would go.

Mr. Grodsky: I did not make any indications.

Trial Examiner: Well, no, I do not construe it as such. I am going to deny the motion. I will say that the prima facie showing as far as Mr. Clark is concerned thus far, is somewhat scanty, but I think there is enough in the record to warrant this conversation.

Mr. Kaufman: Will you deny it without prejudice, subject to a later motion to strike?

Trial Examiner: Yes, I think so. I am not sold on the showing, I tell you frankly, as to Mr. Clark. I have received the conversation against the background of some authorities along the lines that I have indicated to you.

Mr. Kaufman: Right.

(Testimony of Maxine Galt.)

Cross-Examination

By Mr. Kaufman:

Q. Is your name Mrs. Galt? A. Yes.

Q. Is there a Mr. Galt? [127] A. No, sir.

Q. Are you divorced? A. Yes.

Mr. Grodsky: I will object, Mr. Examiner. I do not see what possible bearing it has on any issue in the case.

Trial Examiner: Well, she has answered the question, and it doesn't make any difference, I can tell you that, Mr. Kaufman.

Mr. Kaufman: I am finding out the background for the record.

Q. (By Mr. Kaufman): Do you know Jack Heller? A. Yes, sir.

Mr. Grodsky: I suggest—well, all right.

Q. (By Mr. Kaufman): What is Mr. Heller's title or position?

A. I don't know what you mean.

Q. Well, maybe I can help you. Do you know Mr. Heller works for a living? A. Yes, sir.

Q. Who does he work for?

A. For the Press Telegram.

Q. The Press Telegram isn't one of Colonel Smith's newspapers, is it? A. No, sir.

Q. And in some ways it covers some of the same areas that Mr. Smith's newspapers does; is that correct? [128] A. I guess so.

Q. Well, you know, it is true isn't it? You

(Testimony of Maxine Galt.)

know that, do you not? A. Yes, sir.

Q. Now, is it not a fact that on many occasions you would have lunch with Mr. Jack Heller?

A. I would not say on many occasions, maybe two or three times.

Q. Is it not a fact that these lunches were social in nature, rather than business?

A. Well, I imagine most lunches are social in nature.

Q. Well, was it not called to your attention that Mr. Heller was a married man and that your having lunch with him as often as you were, and he was a competitor, was very much upsetting to Colonel Smith's newspapers?

Mr. Grodsky: I object. I do not see what the materiality of any of this is.

Mr. Kaufman: May I state for the record what the materiality is?

Trial Examiner: Sure.

Mr. Kaufman: This is an adverse witness and so far as we are concerned, I am certainly thus entitled to show motive or bias of any witness. I am not bringing forth any misconduct as such, but merely to show that this discussion which was in her mind was creating a motive and bias. [129]

Trial Examiner: You are entitled to show this and this pending question I would regard as preliminary to that.

Mr. Kaufman: That is correct.

Trial Examiner: It would have to be connected

(Testimony of Maxine Galt.)

with something in fact here. I will overrule the objection.

Mr. Kaufman: May I have the last question read, please?

Trial Examiner: Yes, please read the last question.

(Question read.)

Trial Examiner: Was that called to your attention; that is the question?

The Witness: Specifically, you mean?

Trial Examiner: Well, it either was or it wasn't. If it was your answer would be "yes," and if it wasn't your answer would be "no," and you are not required to go any further.

The Witness: But I don't understand what the point of it is. I have had lunch with various people that have been married and that——

Trial Examiner: Excuse me a minute. Let us keep something straight here. Counsel is just asking you whether something was called to your attention by somebody.

The Witness: Certainly sir, I knew he was married.

Trial Examiner: No, no, no.

Mr. Grodsky: I want to object to the question on the ground that it is incompetent, and compound. It is obvious that that is where the difficulty is. [130]

I will further object to it that it is vague and indefinite. I think if the witness were asked about

(Testimony of Maxine Galt.)

a specific person who told something to her, it might be that the witness would not have so much difficulty.

Mr. Kaufman: I will restate the question if you want. Do you want me to, your Honor?

Trial Examiner: Well, the witness has already answered and I assume the answer is that she doesn't understand the question.

I was about to help her with it but in face of Mr. Grodsky's position, it isn't my question.

Q. (By Mr. Kaufman): All right. Mrs. Galt did any one in the Smith organization speak to you about the fact that you were having lunch with Mr. Jack Heller on numerous occasions?

A. No, sir.

Q. Never? A. No, sir, not that I recall.

Q. Did any one in the organization speak to you about the fact that you should not have lunch with a competitor, to wit, Mr. Heller? A. No, sir.

Q. Then I take it when you answered the original question that I put to you before it was determined that it was ambiguous and when you answered it "not specifically" or "specifically" with a question mark, what did you mean? [131]

Mr. Grodsky: I will object to that because that question was striken and no reference can be made of it.

Trial Examiner: The question was stricken?

Mr. Grodsky: It was withdrawn and now he is trying to incorporate it——

(Testimony of Maxine Galt.)

Mr. Kaufman: I said I would rephrase the question.

Trial Examiner: Excuse me, this is something she is supposed to have said when she was being interrogated about the same question and she answered "specifically"?

Mr. Kaufman: The reporter can read it back if you wish.

Trial Examiner: I think so.

(Question read.)

Trial Examiner: I will sustain the objection.

Q. (By Mr. Kaufman): In your job as society editor, that was the title you had, was it not?

A. Yes, sir.

Q. Did that call for you to discuss things with Mr. Clark?

A. How do you mean "discuss things"?

Q. Well, did your work take you into contact with Mr. Clark?

A. Yes, sir, he was at the office on occasions. I had worked with him back in display.

Q. Well, he was working out of a different office from what you were? A. Yes, sir.

Q. Did you go out to see him on any [132] occasions? A. No, sir.

Q. Would he come into the office specifically to see you on business? A. No, sir.

Q. So actually, from a business standpoint, you had no contact with Mr. Clark; is that correct?

A. Yes, sir.

(Testimony of Maxine Galt.)

Q. Now, where did this conversation take place did you say? A. At the Compton office.

Q. He came into the office there? A. Yes.

Q. And you have already told us what he said to you? A. Yes, sir.

Q. And no one but you was present; is that right, Mrs. Galt? A. That is right.

Q. You had access to advertising forms, had you not, Mrs. Galt?

A. I worked at the copy display desk.

Q. You had access to these forms; is that right?

Mr. Grodsky: Well, at what time, Mr. Kaufman?

Mr. Kaufman: At the time she was working there.

Mr. Grodsky: This is an objection, Mr. Examiner.

Trial Examiner: Well, I will overrule the objection. It is preliminary. [133]

Q. (By Mr. Kaufman): Did you have access to that? A. When I worked in display?

Q. As a society editor later, did you have access to those forms? A. If I wanted to, I suppose.

Q. And the advertising forms for the Lakewood paper were also available to you, were they not, if you wanted them?

A. If there was any necessity for me to look at them I suppose so.

Q. Now, Mr. Heller is the—strike that. In a sense, Mr. Heller was a direct competitor to Mr. Clark; is that correct? A. Yes.

(Testimony of Maxine Galt.)

Q. You said you only had lunch with him about three times?

A. I didn't keep track. Occasionally when he would stop at the office, I might have lunch with him but as far as I know, other people in the organization had gone to lunch with him.

Q. Over what period did you go to lunch with him?

Mr. Grodsky: Mr. Examiner, at this time I am going to renew my objection. I do not see that all these questions and answers are getting us anywhere, except wasting time and cluttering up the record.

Trial Examiner: Well, I don't know yet, Mr. Grodsky.

Mr. Kaufman: I will pursue this a very little further, your Honor. [134]

Trial Examiner: Go ahead, sir.

Q. (By Mr. Kaufman): Over what period did you have lunch?

A. During the course of the time I had worked for the paper.

Q. Beginning when and ending when?

A. I had worked for one and a half years for the paper.

Q. And you had lunch with him over this period of time, Mrs. Galt? A. Yes, sir.

Q. Well, there were many times in excess of three, were there not?

A. He did not stop in at the paper too often.

(Testimony of Maxine Galt.)

Q. I said there were many times in excess of three, were there not?

A. I could not say exactly, sir.

Mr. Kaufman: May I consult with a witness, your Honor, will you excuse me?

Trial Examiner: Sure.

Q. (By Mr. Kaufman): Mr. Warren Butler discharged you, did he not? A. Yes, sir.

Q. And your discharge was to take place as of a Saturday; isn't that correct? A. Yes, sir.

Q. Actually you were quite angry and walked out on a Tuesday; is that correct? [135]

A. I was upset.

Q. And you knew by walking out on a Tuesday that you left the paper in the lurch; is that correct?

A. I wasn't thinking of that at the time.

Q. You did know it?

A. Yes, I went in, in the same way and I left in the same way.

Trial Examiner: I do not understand that. What do you mean by "I went in, in the same way and I left in the same way"?

The Witness: Well, I was hired in one a Tuesday before the paper went to press and I left the same day.

Trial Examiner: I see.

Q. (By Mr. Kaufman): You were angry, were you not? A. I was more upset.

Q. You were angry, were you not?

A. No, sir, not at that moment.

Q. Oh, you became angry later?

(Testimony of Maxine Galt.)

A. Not so much mad as upset.

Q. When you said "not at that moment," did you mean that you became angry later on then?

Mr. Grodsky: I object to that, Mr. Examiner, he is just trying to badger the witness. It is perfectly clear what the witness meant.

Trial Examiner: Well, she put herself into it.

The Witness: I was referring to when I walked out, as I thought he was referring to that. [136]

Trial Examiner: Well, tell us if you became angry later and you can answer that "yes" or "no."

The Witness: I suppose so, a little. [137]

* * *

Recross-Examination

By Mr. Kaufman:

Q. Actually, coming back to competition, [139] you knew, did you not, that it would be of interest to Mr. Heller to see certain layouts?

Mr. Grodsky: I will object to that, Mr. Examiner.

Trial Examiner: Well, she can answer whether she knows it. That is what the question called for, whether she knew it was of interest to him.

The Witness: It probably would be.

Trial Examiner: Well, don't give us your guess. Give us your knowledge. The question doesn't call for your guess. Do you know whether it would be of any interest to him?

The Witness: No, not necessarily.

(Testimony of Maxine Galt.)

Q. (By Mr. Kaufman): You had been in advertising yourself, had you not? A. Yes, sir.

Q. And you knew that a man working for the Press Telegram would be most interested in knowing the layout of advertising put out by the Colonel, the Herald American, or one of the Herald American newspapers, didn't you?

Mr. Grodsky: I will object to that. It is calling for a conjecture, surmise and speculation.

Trial Examiner: Well, he is asking her for her knowledge.

Mr. Grodsky: He is using the word "knowledge" but he is asking for an opinion.

Trial Examiner: I cautioned the witness before and I told her we were asking for her knowledge, not her speculation [140] or guess.

Mr. Kaufman: In fairness, your Honor, my interrogation has brought out that this witness has worked in advertising in Compton for the Herald American and she has now sufficient background to form an opinion.

Trial Examiner: The question calls for her knowledge.

Mr. Kaufman: That is correct.

Trial Examiner: It doesn't call for a guess. Go ahead, Madam.

The Witness: Well, the answer would be "yes," I guess.

Q. (By Mr. Kaufman): You also saw Mr. Heller in the evenings, did you not?

A. I do not see what that has to do with it.

(Testimony of Maxine Galt.)

Mr. Grodsky: I will object to the question.

Trial Examiner: Why, Mr. Grodsky?

Mr. Grodsky: Well, I do not think that anything thus far developed indicates any reason for going into anything like that.

Trial Examiner: Well, my feeling is this, Mr. Kaufman. Had you established any reasonable probability of a showing of a motive, I would be inclined to permit it because I think you ought to have latitude in this area.

Mr. Kaufman: May I be heard?

Trial Examiner: Go ahead, sir.

Mr. Kaufman: Did the witness not state that she became [141] angry?

Trial Examiner: What has this got to do with Mr. Heller?

Mr. Kaufman: You said if I had shown any motive or bias. Anger is a motive or bias.

Trial Examiner: Don't you understand that we were talking about the pending question relating to Mr. Clark.

Mr. Kaufman: Other people may have gone to lunch and it is all right to go to lunch, but I am saying that this is a competitor of our newspaper and she not only went to lunch but she went to dinner with him. Actually that has some bearing on why she was fired. [142]

* * *

ONEY A. FLEENER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: Keep your voice up when you testify.

The Witness: All right, sir.

Direct Examination

By Mr. Grodsky:

Q. What is your name and your address, Mr. Fleener?

A. Oney A. Fleener, 1826 Bales, Compton.

Q. Mr. Fleener, in July of 1954, what was your position with [146] the Herald American?

A. I was combination—advertising editor.

Mr. Kaufman: I did not hear that.

The Witness: May I make a statement just now to show that——

Trial Examiner: I think that would be unwise. Just answer the question and you are doing your duty when you do that.

Q. (By Mr. Grodsky): Do you know Sol London who used to be a reporter at the Herald?

A. Yes.

Q. And you know he was discharged on a certain day? A. Yes.

Q. On the day of his discharge, did you have any discussion concerning his discharge with any representative of the management?

A. It wasn't so much of a discussion as a passing remark.

(Testimony of Oney A. Fleener.)

Q. With whom did you have that conversation?

A. With Mr. Butler out on the street.

Q. About how long after the discharge did this take place?

A. I would say within about one hour or less, but I am not sure.

Q. Now, what did you say and what did Mr. Butler say?

Trial Examiner: Give us the full conversation, please.

Mr. Grodsky: Yes. [147]

Trial Examiner: Between you and Mr. Butler.

The Witness: It was like this. I said, "Sol tells me that he got fired because he belonged to the union."

And Mr. Butler explained to me that he wasn't doing his duties properly and he was discharged because he was taking time off in working for the union when he should have been doing his newspaper duties.

Trial Examiner: Well, this is what Mr. Butler said; is that it?

The Witness: Mr. Butler said he was discharged because he was working for the union instead of working for the newspaper. That is as near as I can remember although it isn't the exact quotes. [148]

* * *

(Testimony of Oney A. Fleener.)

Cross-Examination

By Mr. Kaufman:

Q. As I understand it, Mr. Fleener, you had a conversation with Mr. Butler the same day, as far as you know, that Mr. Sol London, who is sitting at General Counsel's table, was fired; is that correct? A. I did say that.

Q. Now, do I understand from your testimony, that Mr. Butler told you that Mr. London was fired because his work in the paper was inefficient; is that correct?

A. That included the general setup, that his time was taken up with the union and not with the other things that he should have been doing.

Q. Do you—strike that. Did you understand that from the conversation with Mr. Butler that the basis of the firing was that the man's work was not up to snuff, that he had been doing other things; is that your understanding?

A. My understanding is that the union had interfered with his work and that the union activity brought it to a head.

Q. But the head was brought, as I understand it, because his work wasn't up to snuff; is that a fair assumption?

A. He said because he was spending so much time with the [150] union activities.

Q. That his work was suffering, is that right?

A. I drew that conclusion, that was my opinion.

(Testimony of Oney A. Fleener.)

Trial Examiner: And you drew that conclusion from what Mr. Butler said; is that it? Just tell me "yes" or "no," if that is what you drew your conclusion from.

The Witness: Yes, it was involving the union.

Trial Examiner: You said you drew a conclusion. This was an interpretation put by you upon what Mr. Butler said?

The Witness: Yes. [151]

* * *

WILLIAM L. SHEETS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you state your name and address, sir?

A. William L. Sheets, 5922 Clark Avenue, Lakewood, California.

Q. Now, what was your position before the time when Mr. London was discharged; in other words, in July of this year?

A. I was termed an editor of the Lakewood-Bellflower editions.

Trial Examiner: Before we move away from the subject, are you now employed by the Herald American?

The Witness: I am, sir.

Q. (By Mr. Grodsky): Your designation was

(Testimony of William L. Sheets.)

division editor? A. Yes.

Q. Now, during that period of time, and I will ask you about the time later, did you have any discussion with any representative of management which related to the Guild organizing drive?

A. Yes.

Q. With whom?

A. I recall a conversation by telephone with Colonel Smith.

Q. And approximately what date was it?

A. I don't recall. [152]

Q. Well, just as a point of reference, was it before Mr. London was discharged or after, if you can recall that? A. Frankly, I don't recall.

Q. In your best recollection, if you have any, was it more than a month either way of that or have you no recollection at all?

A. I have no recollection as to the date, sir.

Trial Examiner: Well, can you remember the season of the year?

The Witness: Yes, I would say it was in the summer.

Trial Examiner: Which summer; was it this past summer?

The Witness: This past summer.

Trial Examiner: Now, the summer includes the months, as you know, of June, July August and part of September. Have you any recollection which of those months it was?

The Witness: I would estimate probably June or July.

(Testimony of William L. Sheets.)

Q. (By Mr. Grodsky): Now, who initiated the conversation, do you recall that?

A. Colonel Smith.

Q. Now, what did he say to you and what, if anything, did you say to him?

A. I don't recall any statements. I recall that he telephoned me at the Bellflower office and told me he had learned of a movement to organize a Guild in the Herald American, and that he would rather close his papers down than [153] sign up with the Guild.

Q. Did you tell that to any other employee, that is, that you had had this conversation with Mr. Smith and he had said that?

A. Yes, I am sure that I would but I do not recall to whom I made the statement.

Q. Do you recall any discussion with Mr. Lou Murray which involved the Guild organizing campaign? A. Yes, sir.

Q. Do you recall when your conversation with Mr. Murray took place?

A. Probably within the same span of season. I do not recall exactly when it was.

Trial Examiner: Do I understand that this was in June or July according to your best recollection?

The Witness: That would be my guess, June or July.

Q. (By Mr. Grodsky): Now, could you relate that conversation in any way to the time when Mr. London was discharged?

(Testimony of William L. Sheets.)

Trial Examiner: In other words, was it before or after; that is what counsel is getting at.

The Witness: I believe it was after Mr. London's discharge.

Q. (By Mr. Grodsky): Will you tell us what Mr. Murray said to you?

A. In this specific instance, Mr. Murray visited me at home, at least, he was there when I got home. I came from work [154] around the middle of the afternoon and he told me that he came there, to my home, to see if a union meeting was in progress on my premises.

And I asked him why he assumed that and he said he had overheard me talking to Ray Ross and inviting him over to my patio to pitch horseshoes, and that he had assumed that "horseshoes" was the code word to signify the intention of calling a union meeting.

And he had visited my home to verify it and he apologized for his misapprehensions. [155]

* * *

WARREN W. BUTLER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you state your name, please?

A. Warren W. Butler.

(Testimony of Warren W. Butler.)

Q. And your address?

A. 1208 East Tichenor Street, Compton.

Q. What is your position?

A. They refer to me as "managing editor."

Q. Of the entire chain of newspapers?

A. That is right.

Q. Do you have any activities outside of being managing editor, I mean, business activities?

A. Well, I have a public office.

Q. What do you mean by a "public office"?

A. Well, I represent the City of Compton on the Board of Directors of the Metropolitan Water District and I am also Vice Chairman of the Board.

Q. And does that take any substantial amount of your time?

A. No, not a great deal. I would say about parts of fifteen days a year.

Q. When you say "parts of fifteen days a year," what roughly is the amount of time that you have to spend away from the office in connection with [159] that?

A. Well, on the day that the Board would meet, I would come down to the office probably around 8:00 o'clock in the morning and leave somewhere between 9:45 and 10:30 to get to the committee meeting down here in Los Angeles.

And I would return anywhere from 3:00 until 3:00 o'clock. It is held on the second Tuesday of the month.

Q. And during your absence, who would be in charge of the editorial department?

(Testimony of Warren W. Butler.)

A. No one. As a matter of fact, many times I would call by telephone to give instructions on various things.

Q. To whom would you give instructions?

A. Various people.

Q. Did you use Mr. Cleland as a contact man?

A. Sometimes, yes.

Q. Did you use him more than anybody else?

A. Probably so, he coordinated the news on the Compton and Lynwood papers.

Q. Now, on your vacations was there any specific person who usually took over?

A. Not to my knowledge. I think if it was anything in the matter of authority, it was usually Mr. Brewer who took over when I was on my vacation.

Mr. Cleland had no authority to hire or dismiss anybody or discipline them or raise or lower their salary or anything of that kind. His only activity was coordination. [160]

Trial Examiner: I don't know what you mean by "coordination" here.

The Witness: Well, when you are getting out news, you have to have some way that one person knows what is going on for a whole paper, so that there is no duplication of news, and the thing is properly handled in that respect.

Trial Examiner: That is the way you use the term "coordination" here?

The Witness: That is right. That was his only activity other than reporting news.

Trial Examiner: All right, sir. Go ahead.

(Testimony of Warren W. Butler.)

Q. (By Mr. Grodsky): Now, did your activities at the Water District ever take you away from Los Angeles?

A. Once in a great while, I would say, yes. Probably once or twice a year.

Q. And for how long?

A. There would be some years when I would not be away at all, particularly during the war. Two or three days it would be for a trip over to the Colorada River aqueduct or something like that.

Q. In addition to those, were there any other times when you would be away from more than just the single working days; in other words, overnight trips on business either for the newspaper or for the Water District?

A. I don't recall any since, oh, probably 1951 or thereabouts. [161]

Q. Did you ever have occasion to go up to Sacramento?

A. That is what I am referring to.

Q. The last time was in 1951?

A. I may have gone up—no, let me see—I may have gone up in 1953. I am not sure about that.

Q. How long were you gone on that occasion?

Mr. Kaufman: On which occasion?

Mr. Grodsky: The last occasion when he was at Sacramento. I think the record is clear on that.

Mr. Kaufman: I don't know that it is. I will object to the question on the grounds that it is ambiguous.

(Testimony of Warren W. Butler.)

Trial Examiner: Do you understand the question?

The Witness: Well, I could not state the exact date.

Trial Examiner: Do you understand the question?

The Witness: Yes, I think so.

Mr. Kaufman: I am wondering——

Mr. Grodsky: I will rephrase it.

Trial Examiner: All right.

Q. (By Mr. Grodsky): On the last occasion that you recall going to Sacramento for how long a period of time did you go up there?

A. I think I flew up in the morning and flew back the following evening. I recall one case at least when something came up that I called down here to give instructions over the telephone when I encountered something up there that [162] should have been taken care of by the paper.

Q. It was something to do with the paper?

A. Yes.

Q. It was something to do with the editorial part of the paper? A. Yes.

Q. With whom did you talk?

A. Mr. Cleland, I believe.

Q. You discharged Sol London?

A. Yes, sir.

Q. At the time you discharged him, did you know of his activity on business of the union?

A. I had only heard a vague report which was indirectly, that he had been spending working time

(Testimony of Warren W. Butler.)

in the office down there, soliciting memberships for the union.

Q. From whom did you have the report?

A. I believe it was Mr. Brewer, but it was indirect.

Trial Examiner: Would you keep your voice up, please, Mr. Butler?

The Witness: I am sorry.

Q. (By Mr. Grodsky): All right, when did you have that report?

A. Oh, it was probably a week or two before I discharged him.

Q. Did you discuss it with anybody else?

A. No, I do not recall discussing it with anybody else. [163]

Q. Did you try to verify it in any way?

A. No, I don't believe I did.

Q. Were you having trouble at all with Mr. London? A. Yes.

Q. What trouble were you having with him?

A. Well, I would say about a week or so before I discharged him. I don't recall the exact date now. I arrived at the Long Beach office before noon on a Thursday, shortly before noon, and Mr. London wasn't present.

And I was informed by other people in the office that he had left for the day. I had previously warned him about leaving early on Thursday.

Q. Mr. Butler, did Mr. London have any regular afternoon off?

A. Saturday afternoon off, yes, sir.

(Testimony of Warren W. Butler.)

Q. Is that the only afternoon off, to your knowledge?

A. Well, perhaps I had better point this out. When he worked in the Compton office he worked all day Saturday, and then he had Thursday afternoon off, but that wasn't true after he went to the Long Beach office, because he was always through before noon on Saturday.

Q. Do you know what the situation was with reference to working Tuesday nights in the Long Beach office?

A. I know that he did sometimes. That was of his own accord, however. I never at any time instructed him to work [164] on Tuesday nights.

Q. Why did he pick Tuesday night, if he picked any night, to work?

A. Well, I imagine because the paper was coming out the next day and if he was behind in his work, naturally he would want to catch up with it.

Q. Did you ever observe whether he worked on Tuesday nights?

A. I don't know about observations, but I think I was aware of it.

Q. Did you ever tell him that he should not work on Tuesday nights.

A. No, I do not recall telling him that directly. I know I never instructed him to work Tuesdays.

Q. Isn't it a fact that he took Thursday afternoon off with your knowledge, because he worked Tuesday nights?

A. No, that isn't a fact.

(Testimony of Warren W. Butler.)

Q. Then it was a complete surprise to you when you found out that he was taking Thursday afternoons off?

A. Well, I would not say it was a surprise to me because Sol was very careless about his work any way. He was late in arriving lots of times.

Q. Let us stick to this Thursday that you know of. A. Yes.

Q. Did he only take the Thursday afternoon off, to your knowledge, on one or two occasions? [165]

A. No, I would say that I knew of several more than that.

Q. Isn't it a fact that Thursday afternoon, it was his regular practice to take Thursday afternoon off?

Mr. Kaufman: I submit that it has already been asked and answered on at least two different occasions.

Trial Examiner: I don't think so. I will overrule the objection.

Mr. Kaufman: I didn't hear you, sir.

Trial Examiner: I will overrule the objection.

Mr. Kaufman: Thank you.

The Witness: I am not certain that it was, no.

Q. (By Mr. Grodsky): How long had he worked at the Long Beach office?

A. My memory isn't very clear on that point, but I would say six or eight months.

Q. And in that six or eight months you were only aware of him taking off Thursday afternoon

(Testimony of Warren W. Butler.)

in the last two weeks approximately of his employment?

A. I did not say that, no. If you will recall, Mr. Grodsky, I told you that I had warned him on one previous occasion about this.

Mr. Grodsky: I am letting the record speak for itself. I am trying to explore the facts that I am interested in.

Q. (By Mr. Grodsky): Do you have a record here by which you can determine how long he worked at the Long Beach office? [166]

A. I don't have it here but I can get it.

Q. Well, if I would suggest to you that he was transferred to the Long Beach office in July of 1953, can you think back and say whether that might be correct?

A. That doesn't sound correct to me. I would say that it was later than that, but I am not positive because my memory isn't clear.

Q. After he first went to work in that office, when was the first time that you can recall that you became aware of the fact that he wasn't working on a Thursday afternoon?

A. It was quite some time after that but I don't recall when.

Q. Well, was it in 1953 or 1954?

A. I couldn't swear as to that.

Q. Did you find out about it in the spring of 1954? Did you know about it then?

A. Probably so.

Q. Did you talk to him about it then?

(Testimony of Warren W. Butler.)

A. I don't recall exactly when it was that I talked to him. I know that it was some time prior to this incident that I spoke of when I did not find him there prior to noon on the Thursday.

Q. How long prior to that, then was it, that you spoke to him?

A. If I were guessing, I would say it would be between one [167] and two months, but I couldn't swear to it.

Q. When you say you are guessing, do you mean that you are just picking a figure out of the air or do you mean that that is your best recollection, but your recollection is hazy?

A. Let us say that my recollection is very vague on the point.

Q. But you do remember talking to him?

A. Very definitely.

Q. Now, on that occasion when you spoke to him, what did you say to him and what, if anything, did he say to you?

A. My memory is vague on the conversation but as I recall, I called his attention to the fact, and that he did have Saturday afternoons off. We were supposed to be on the job five and a half days in the week, too, and that he should not be leaving early on Thursday any more.

Q. Well, I think that you are sort of summarizing the conversation.

A. Well, I don't remember the exact conversation and that is the reason I am trying to give you to the best of my knowledge what I can recall.

(Testimony of Warren W. Butler.)

Q. Well, without remembering the exact words, somehow the Saturday afternoon came into it in some way? A. Yes.

Q. Just what was said that brought Saturday afternoon into the picture? Who said what? [168]

A. I don't know how I can elaborate on that any further than I have already done that would give you any better information because, as I say, my memory of the conversation is very vague as to what actually was said.

Trial Examiner: Where was the conversation?

The Witness: As I remember it was just outside of the Long Beach office. If I have to criticize an employee, I take them away from the other employees where it doesn't become a matter of gossip.

Trial Examiner: Was this on a Thursday or on some other day of the week?

The Witness: It could have been on Thursday but I would not be certain about it.

Trial Examiner: As I understand it, you came to the Long Beach office that day?

The Witness: Yes. The reason I say it may have been Thursday is that in the normal course of my operation, I normally go to all of the offices on Thursdays.

Trial Examiner: On Thursdays?

The Witness: Yes.

Trial Examiner: And do I understand that you found Mr. London was in the office on that day?

The Witness: Yes, I think that is correct. It was around the middle of the day in fact.

(Testimony of Warren W. Butler.)

Trial Examiner: Now, perhaps you can remember whether you [169] had had lunch before you spoke to Mr. London?

The Witness: No, I don't remember that.

Trial Examiner: Well, what time of the day do you normally come to the Long Beach office?

The Witness: Well, ordinarily I would get started from the Compton office somewhere between 10:30 and, oh, even as late as 2:00. I follow that routine every week, so that it is difficult to remember what I might have done on any particular day.

Trial Examiner: What prompted you to talk to Mr. London?

The Witness: Well, I had been going to the office on a number of occasions on Thursday afternoons and I would not find him there. And as a result, I began to become suspicious of what he was doing.

Trial Examiner: How many times had this happened before the occasion you spoke of?

The Witness: Oh, I would say at least four or five times.

Trial Examiner: Had you ever spoken to him about it before this occasion on this Thursday when you were there?

The Witness: I do not recall any conversation, no. It is true that when Mr. London first came to work for us——

Trial Examiner: What were the scheduled hours of work in the Long Beach Office?

The Witness: Well, normally an employee would

(Testimony of Warren W. Butler.)

get there by 9:00 and leave around 5:00 on an average day. Newspaper [170] work is the kind of work where there are variations and sometimes you might leave a little early and sometimes you might get there a little earlier. You do not punch a clock.

Trial Examiner: Well, were there scheduled hours, that is what I am referring to?

The Witness: In a general way, yes.

Trial Examiner: And these you say were from 9:00 to 5:00?

The Witness: That is right.

Trial Examiner: And was there a scheduled lunch period?

The Witness: No, no scheduled lunch period. There again you have that same problem. Sometimes there will be a luncheon at some civic club that a reporter would go to.

Trial Examiner: Does the Long Beach office close on Saturday afternoon?

The Witness: Yes.

Trial Examiner: And at what time is that?

The Witness: Noon, I believe.

Trial Examiner: By "noon," I take it you mean 12:00 rather than 1:00?

The Witness: Yes, so far as I know. I cannot recall of any time being at the Long Beach office exactly at noon but that was my understanding.

Trial Examiner: Was there any time kept of employees' hours of work in the Long Beach office, either by clock or [171] anything else?

The Witness: Not to my knowledge.

(Testimony of Warren W. Butler.)

Trial Examiner: No such system had ever been inaugurated so far as you know?

The Witness: No, editorial work doesn't work in that way.

Trial Examiner: Are employees required to make out weekly or daily reports of their working time? Are they required to summarize where they were or what they did during the working time?

The Witness: No, they are judged on their performance.

Trial Examiner: Is there anybody in the office at Long Beach who has the responsibility of seeing to it that an employee comes in at a given time and leaves at a given time—was there during Mr. London's tenure?

The Witness: To my knowledge, no. Some parts of the business operation I am not as familiar with as I am with the editorial.

Trial Examiner: All right then, go ahead Mr. Grodsky.

Q. (By Mr. Grodsky): Now, just in connection with the hours, do you know whether or not the Long Beach City Council had regular meetings?

A. They met on Tuesday morning to my knowledge.

Q. Do you know what time those meetings started? A. No, I don't.

Q. If I suggested they started at 8:30 in the morning, would [172] that refresh your recollection in any way?

A. It could be but I don't know.

(Testimony of Warren W. Butler.)

Q. It was one of Mr. London's duties to cover that Long Beach Civil Council?

A. Yes, in a way, to get the news of what was going on in the Long Beach City Hall.

Q. When you came to the Long Beach office on Thursday afternoon and saw that Mr. London wasn't there, the first time or two, did you inquire from any other employee as to his whereabouts?

A. I think I did on one or two occasions, yes.

Q. And did the employees tell you that it was his afternoon off?

A. No, they would not have any particular business to tell me that because he was answerable to me, not to the others.

Q. Well, what did they tell you?

A. As I recall about the only thing they did tell me was, well, that he had gone for the day.

Trial Examiner: Do you remember who told you that?

The Witness: I believe on one occasion the man who is in charge of advertising. I don't recall his name at all.

Mr. Grodsky: Was it Irvin Greenhaugh?

The Witness: It could have been. As I recall, there was a change in the management there and I am not certain as to when it took place. [173]

Q. (By Mr. Grodsky): And did you get in touch with Mr. London to find out why he was gone for the day?

A. No, as I say, the thing I was mainly interested in was whether he was making a habit of

(Testimony of Warren W. Butler.)

that or not. In other words, the point as I made before, the main thing in this was performance and naturally, it was like I explained to the man here, there were meetings to cover at noon, there might be something in the early morning, and I recognized the right of the employee, if he had some duties that were out of the working hours, he might go home a little earlier, but to take regular every afternoon off, that is something different.

Trial Examiner: Do you mean every afternoon?

The Witness: I mean every Thursday afternoon.

Q. (By Mr. Grodsky): Now, on the occasion when you talked to him about his habit of taking Thursday afternoons off, do you recall if he admitted to you it was his habit?

A. He claimed it was his right to take it off.

Q. Did he give you a reason for that?

A. No, I don't recall that he did, excepting that he had always had it off and thought he was eneitled to have it off.

Q. And did the matter of working on Tuesday nights come up at all in the discussion?

A. If it did, I do not recall, but I would not say that it did not.

Q. I see. Do you know actually how many hours per week Mr. [174] London put in on his job?

A. No.

Q. As an average? A. No.

Q. You don't know? A. No.

Q. Did he ever tell you how many hours he had been putting in?

(Testimony of Warren W. Butler.)

A. He may have but I don't recall.

Q. Did he ever work—strike that. Did he ever ask you for a raise?

A. Yes, on numerous occasions. I do not believe any employee asked me for a raise any more times than Sol London did.

Q. Did he ever get a raise? A. Yes.

Q. Did he ever get a raise without asking for it?

A. I believe so, but I am not certain as to that. From time to time we would figure our salaries were not high enough and we would raise them up somewhat and I think probably he was the recipient of increases on that basis.

Q. Now, on any of the occasions when he asked you for a raise, did he try to justify it on the basis that he was putting in a lot of hours?

A. If he did, I don't recall it.

Q. Do you recall him saying that he was putting in more than [175] fifty hours a week?

A. No, I don't recall any statement of that kind.

Q. You have no idea of how many hours he was putting in?

A. No, I am concerned with performance. Now, I realize that one man can work twice as fast as another man. That happens sometimes. Well, that sort of thing is usually discussed with an employee at the start, pointing out that we expect a good performance and if they are competent they can get it out within a reasonable sort of time.

(Testimony of Warren W. Butler.)

Trial Examiner: Mr. Butler, was there anything special about Tuesday in the way of putting out of papers? Did anything special occur on that day?

The Witness: No, nothing than what I have pointed out previously that the paper went to press the following day.

Q. (By Trial Examiner): On Wednesdays?

A. Yes, if he got behind, he would try and catch up.

Q. Then if I understand correctly, everything had to be set up and this would have to be prepared not later than a Tuesday; is that the case?

A. No, that wasn't true with the Long Beach paper because we did not start making it up until Tuesday afternoon.

Q. By "making it up" what do you mean? You must understand that I am not a newspaper man, I am not in the newspaper business.

A. Well, Mr. London would come up from Long Beach and would [176] watch the printer as he put the type in the paper and point out where he wanted this story and that story.

Q. When, from your knowledge of the business, would the editorial work, the physical task of writing up, be completed in order to meet the press?

A. Well, ordinarily, we would try to get it clear by noon.

Q. On what day?

A. On Wednesday. Of course, that would not be an iron clamp situation. For example, I recall one day on which there was an important meeting in

(Testimony of Warren W. Butler.)

Long Beach and I went down and covered it during the noon hour and got it into the paper.

Q. On Wednesday? A. Yes.

Q. This was a sort of "stop the press" situation? A. In a sense, yes.

Trial Examiner: All right.

Q. (By Mr. Grodsky): May I ask you, who was the man who stopped the press, so to [177] speak?

* * *

The Witness: On one occasion it was myself.

Q. (By Mr. Grodsky): And on another occasion, was it Colonel Smith?

A. Yes, I believe so.

Q. (By Trial Examiner): Had it come to your attention or knowledge through any source that Mr. London spent any time working after 5:00 p.m. on Tuesday night or nights?

A. Well, I think I was aware that he did sometimes, yes.

Q. And was it he who told you on any occasion?

A. It could have been although I cannot say that I specifically remember such as conversation.

Q. (By Mr. Grodsky): Have you seen Mr. Londan at the Compton office on Tuesday nights at any time? A. Yes, I think I have.

Q. At what time of the evening can you place it?

(Testimony of Warren W. Butler.)

A. That would be difficult to say, but perhaps it was 8:00 or 9:00. [178]

Q. (By Trial Examiner): Now, this was during the time that he was stationed at the Long Beach office? A. Yes.

Q. And what was he in Compton for?

A. I suppose bringing copy to the machines. You see the last messenger would come up around 5:30. We have a messenger service.

Q. Well, was there any standing practice or rule that news items as a general matter, would have to be into the Compton office by Tuesday at some time or other?

A. Well, no, nothing other than this. Naturally, we find that some employees procrastinate and it is necessary—you hire a lino machine operator to start work at 8:00 in the morning on Monday and if your employees procrastinate in getting copy in, naturally you are concerned about it.

In other words, I am frequently reminding them that promptness of copy is necessary, because we have to keep the machine operators busy. We cannot wait until Tuesday. From our standpoint a reporter can work easier if he can gather up a lot of stories and write them all at once.

Q. On this occasion, which for want of another name, we can call "the warning occasion," when you warned him about taking Thursday afternoon off before he was discharged, fix your mind on that—did you have any discussion with him about the

(Testimony of Warren W. Butler.)

quality of his work as distinguished from the fact that he [179] was taking Thursday afternoons off?

A. We had—I had a discussion with him but I cannot recall whether it was prior or subsequent to that.

Q. Well, on this occasion, did you tell him that he had either procrastinated or delayed or failed to get in any stories on time?

A. I do not think so on that occasion in that conversation but I do not recall the details of that conversation.

Trial Examiner: Right, Mr. Grodsky.

Q. (By Mr. Grodsky): Was Mr. London the only one of your editors of outlying papers who had to come in on Tuesday afternoons?

A. No, I don't think so. I have seen others there.

Q. Have you seen others there on one or more than one occasion?

A. I would say on more than one occasion probably.

Q. Wasn't it the common practice for the reporters to come in on Tuesday evenings?

A. Not necessarily.

Q. I don't know what means, sir. The question I asked you is, was that the common practice?

A. No, I would not say that it was.

Q. About how many times do you recall seeing Mr. London there on Tuesday evening?

A. Oh, perhaps three or four times. [180]

Q. Well, I think a preliminary question should

(Testimony of Warren W. Butler.)

be about how often were you there say after 6:00 on Tuesday evening? A. Every week?

Q. Until when did you say?

A. On Tuesday evenings now I cover the meetings of the Compton City Council so that I am not there all of the evening, but I usually come back by the office after the meeting is over.

Q. Well, what is your usual routine on a Tuesday evening and I am now referring to the period of, let us say, July of this year?

A. Just about what I described.

Q. Well, incidentally, you did not describe it specifically.

A. What more do you want to know?

Q. You would be at the Compton office until the normal quitting time of 5:00?

A. Sometimes later than that.

Q. At what time would you normally leave it in order to go to the City Council meeting?

A. I would go to dinner then I would come back, come by the office and then on to the meeting.

Q. Then what time did you normally leave on Tuesday evening to go to dinner?

A. Anywhere from 5:30 up to quarter of 7:00.

Q. Then when you would return to the office, about what time [181] would you return?

A. You mean——

Q. From dinner? A. After dinner?

Q. Yes.

Trial Examiner: Well, I assume that would vary?

(Testimony of Warren W. Butler.)

The Witness: The actual sessions began at 8:00.

Q. (By Mr. Grodsky): In other words, you would drop by the office and stay anywhere from a few minutes to an hour and then you would go to the council meeting at 8:00?

A. Well, I don't think it would ever be as long as one hour.

Q. But you would stay there a short time?

A. They have preliminary meetings prior to the council meeting.

Q. But it was your practice to get to the council meeting by 8:00?

A. Not later than 8:00. I was often over there quite a bit before 8:00 o'clock.

Q. Would you return to the meeting after the—I mean, would you return to the office after the meeting was over? A. That is right.

Q. When would that be normally?

A. That has varied all the way from around 8:30 up until midnight. [182]

Q. Then would you stay in the office for any period of time after you returned to the office?

A. It would depend on how late it was, the circumstances and what had accumulated.

Trial Examiner: On any occasion when you returned from the council meetings, did you find Mr. London there?

The Witness: I think probably that I did, but as to saying any specific time or date, that would be impossibile. [183]

* * *

(Testimony of Warren W. Butler.)

Q. (By Mr. Grodsky): Mr. Butler, you discharged Mr. London on July 17th?

A. I believe that is the date, yes.

Q. That was on a Saturday, wasn't it?

A. Yes, I am sure that it was on a Saturday.

Q. Did you give him any notice?

A. No, I do not believe I did right at the time.

Q. Well, did you give him any notice before you discharged him?

A. Not right at the time. As I understand it, he was given two weeks' pay in lieu of notice.

Q. Now, when you went out to effect the discharge, did you have a final check with you? [184]

A. I don't recall about that. It seems to me that I had one check but I would not be positive of it.

Q. Do you recall what you said to him?

A. Not clearly, no, I don't think so.

Q. Mr. Butler, did anyone give you a Guild application card?

A. I don't think anybody gave me any but there was a lot of them laying around the office.

Trial Examiner: Which office is that?

The Witness: The Compton office.

Trial Examiner: While we are on the subject, what was the pay period for employees?

The Witness: Well, we are paid on Friday for the preceding week.

Trial Examiner: Monday through Friday, is that the case?

The Witness: Yes, on a weekly basis.

(Testimony of Warren W. Butler.)

Q. (By Mr. Grodsky): Monday through Saturday it would be?

A. Well, that would be correct.

Trial Examiner: For the preceding week?

The Witness: Yes.

Trial Examiner: That would be, for example, payment on this Friday would be for last week's Monday through Saturday?

The Witness: That is right, as I understand it. You see in the shop, for example, the pay is very complex and it takes a while for the bookkeeper to work it out after the shop time cards come in for the preceding week. [185]

Trial Examiner: All right.

Q. (By Mr. Grodsky): Mr. Butler, did you discharge Ray Ross? A. Yes, I believe I did.

Q. Now, what were the circumstances which led up to Mr. Ross' discharge?

A. Well, that was in the middle of the summer and as I recall it, business had been somewhat slack and as I remember, we had two or three meetings at which we discussed that we might have to cut down expenses and it was as a result of that, as I recall.

Mr. Kaufman: Mr. Butler, would you please speak up? At times I have difficulty in hearing you.

The Witness: I am sorry, my voice doesn't carry very good.

Mr. Kaufman: All right.

Q. (By Mr. Grodsky): Was the decision to fire Ross a sudden decision or was it slow in coming?

A. I would say that it was slow in coming be-

(Testimony of Warren W. Butler.)

cause we had been talking about this problem for quite some time.

Trial Examiner: Who do you mean by "we"?

The Witness: Mr. Smith and various executives of the paper. It was a common economic problem. The summer business was unusually slow.

Q. (By Mr. Grodsky): Was the decision to fire Ross made by you or by someone else?

A. Well, I would say that, as to the individual, it was made [186] by me.

Q. Now, would you explain that a little further?

A. Well, the point that I was saying there, we had several meetings about this problem of expenses.

Q. Yes.

A. And the various phases of that were discussed in considerable detail and different people would be discussed but so far as the decision was concerned, it would be my decision as to a particular individual.

Q. As I understand your testimony, and correct me if I am wrong, the discussions were going on during this period between you and Mr. Smith?

A. Yes, and Mr. Brewer.

Q. And Mr. Brewer? A. Yes.

Q. And anybody else?

A. I believe I recall at one meeting Mr. Murray was there, yes.

Q. When did that particular meeting that you recall take place? A. I don't recall.

(Testimony of Warren W. Butler.)

Q. I am talking about the one now at which you recall Mr. Murray was present?

A. I don't remember which one that was.

Q. What time of the year was it, what month or what date, if [187] you can state it? That is, the date these meetings began at which the company executives expressed their anxiety about business.

A. I would say probably early in July, although somewhat earlier in the year, there was some concern, too.

Q. Now, early in July there was some misgiving about the nature of the business?

A. That is right.

Mr. Kaufman: Just a moment, before we pinpoint the date, the date he says, I would say, do I understand that the witness knows definitely or "He would say"?

Mr. Grodsky: Well, I will rephrase the question and I will ask the witness.

Mr. Kaufman: All right.

Q. (By Mr. Grodsky): What is your best recollection as to the date or approximate date when these conversations began with reference to slack business?

A. Well, I would say the series of meetings that I referred to would have begun around the 1st of July and possibly four or five days after that.

Q. Fine. Now, what was discussed at the first of these meetings, if you have any recollection about it?

(Testimony of Warren W. Butler.)

A. Well, mainly the necessity of making the out-go and the in-take have a reasonable balance.

Q. Was there any decision made as to what the executives [188] would do with reference to achieving that goal at that meeting?

A. The first meeting you say?

Q. Yes.

A. If I remember correctly, there wasn't anything definite on that issue.

Q. Was a determination made to explore the possibility of cutting down expenses?

A. Yes, I think that would be discussed.

Q. Was there any decision made as to having other meetings to see what could be done?

A. Well, no, I don't think there was any date or anything like that fixed in advance. We were all around every day and it was a matter of getting together, that was all.

Q. About how long after the first meeting was the next meeting that you recall which relates to this subject?

A. I couldn't place that. I remember three or four of the meetings but as to what dates, I couldn't place them. The only reason that I place the one about the 1st of July is, because I remember very distinctly that that is when business began to fall off.

Q. Now, at any of these meetings, do you recall any definite decision as to what could be done to meet the financial situation that you have described?

(Testimony of Warren W. Butler.)

A. No other than the general conclusion that we would have to [189] cut the payroll.

Q. Now, that general conclusion was reached at one of these meetings? A. Yes.

Q. What is the approximate date of the meeting at which that decision was reached?

A. I would say it was probably sometime in August, but I could not say for sure.

Q. Was there anything specific decided among the executives present at that meeting, as to what would be done in order to achieve the payroll cut?

A. No, I don't recall that there was anything definite. I think Mr. Smith called me later and said, "Well, we will just have to do something about this."

Q. How long after the meeting that you just testified about, the meeting at which it was decided to cut the payroll, about how long afterwards did Mr. Smith telephone you?

A. I think it was shortly before I relieved Mr. Ross.

Q. When you say "shortly before," was it a matter of days or weeks?

A. It could have been the same day and it could have been the previous day, I am not sure about this.

Q. What did Mr. Smith tell you in this telephone call?

Q. He said, "We will have to cut down. We have not got the money to keep all these people on the payroll." [190]

(Testimony of Warren W. Butler.)

Q. Did he specify whom you would have to cut down? A. Not specifically I don't think.

Q. Well, did you discuss different people?

A. I believe that we did but I don't know whether I could recall the details of it or not.

Q. Well, try and give us your best recollection of what Mr. Smith and you said in that telephone conversation?

A. Well, the thing I distinctly remember more than anything else is the fact that he said we had to cut down.

Q. Now, that is the most distinct thing?

A. Yes.

Q. Now what else was said that you can remember? Now, take your time and give us the benefit of your recollection.

A. I think if I remember rightly, something was said about other things being equal, it would be the people who were most recently employed.

Q. How many people did he instruct you you would have to let go, if he did—I don't even know that he did?

A. I don't remember that it was stated, not exactly that way any way. I don't think it was stated in exactly that way.

Q. How many people, in fact, did you discharge?

A. Well, on the particular day that Mr. Ross was discharged, I also discharged another fellow who worked at the Norwalk office. I don't recall his name now.

(Testimony of Warren W. Butler.)

Trial Examiner: It would not be Mr. Collins, would it? [191]

The Witness: Yes, that is right, Mr. Collins.

Q. (By Mr. Grodsky): Anybody else?

A. Not that I can think of on that day. There was one other subsequent to that.

Q. Was that as a result of this layoff?

A. Yes.

Q. How long afterwards?

A. I am not sure about this but if my memory serves me correctly, it was about the end of that week.

Mr. Grodsky: May I see General Counsel's Exhibit No. 6, please?

Q. (By Mr. Grodsky): I will show you, Mr. Butler, General Counsel's Exhibit No. 6 which was prepared by the company from its records. It shows that—well, on this paragraph numbered 6, are the names of the various employees who were discharged. A. Yes.

Q. Now, looking at that, will you tell us, were you referring to Don Widener? A. No.

Q. Well, looking at that again, tell us who you were referring to, please?

A. I imagine it is William Edmond.

Q. Where is his name?

A. Up here (indicating). [192]

Trial Examiner: Item 7.

Mr. Grodsky: Excuse me?

Trial Examiner: Item 7 on the exhibit of August 17th.

(Testimony of Warren W. Butler.)

The Witness: You see Mr. Edmond was laid off as a regular employee. However, he still continued to take pictures for us on occasion and since then we have used him on various irregular employment.

Q. (By Trial Examiner): Now, I notice that Mr. Collins whom you referred to was first hired by the company on August 9th?

A. That is right.

Q. He only worked a few days?

A. He only worked a few days, that is right.

Q. Did he replace someone?

A. I am trying to think what was involved there and it isn't clear in my mind now. You see, the thing that confuses me is that all of this while there were people on vacations and we do a lot of shifting around when they are on vacations, so it is a little bit difficult to say just what was involved there.

Q. (By Mr. Grodsky): Did you discuss with Mr. Smith, the possibility of terminating Donald Desfor?

A. No, Mr. Desfor left of his own accord. He had another job.

Q. Yes, I understand that, but I am talking now at the time that you were discussing with Mr. Smith the necessity of laying off or discharging people with reference to cutting the [193] payroll, did the name Desfor come up?

A. I don't think I ever discussed Mr. Desfor at any time. Mr. Desfor was in the classification of

(Testimony of Warren W. Butler.)

what you might call an apprentice. He wasn't actually called that in the editorial field, but that is what it amounted to.

Q. (By Trial Examiner): Was there any difference in the duties of Mr. Ross and Mr. Desfor?

A. Oh, yes, very much so.

Q. What were they?

A. You see, Mr. Ross was editing the Lakewood edition. He had the responsibility of seeing that the front page was developed properly and that sort of thing, whereas Mr. Desfor was only doing reporting. He wasn't even writing heads. He was a boy just out of U.S.C., so to speak.

Q. And who wrote the heads and the first page after Mr. Ross left? I mean, immediately after he left?

A. If I remember correctly, it was Mr. Fleener, but I am not sure. We had Mr. Derry there for a while in Lakewood and then we shifted him back to Long Beach and it was quite a complicated situation there and at this time I don't remember all the details.

Q. Do I understand you then correctly, that Mr. Ross' duties included the types of work that Mr. Desfor would do, but it wasn't that way in reverse?

A. That is correct, yes. [194]

Trial Examiner: All right.

Q. (By Mr. Grodsky): What kind of work did Mr. Don Widener do?

A. He would be in exactly the same kind of a classification as Mr. Desfor.

(Testimony of Warren W. Butler.)

Q. And Earl Griswold?

A. He was hired quite some time later than that.

Q. That still doesn't answer my question. What kind of work does he do?

A. Well, at the present time, he edits the Lakewood edition.

Q. Was the only reason that you laid off Mr. Ross because you had this economic problem?

A. Well, two things were in consideration there. One was that he was a fairly recent employee and the other was that while Mr. Ross did a reasonably good quality of work, he was extremely slow.

Q. Did you know that Mr. Ross was a union member?

A. He told me that he was at the time that I dismissed him.

Q. Was that the first inkling that you had that he was a member of the union?

A. Well, at that time there were all sorts of rumors floating around. I don't know, other than I had heard it some time, previous to that he informed that he not only was not a member of the union but that he had no use for the union and did not want to work under union conditions. [195]

Q. (By Trial Examiner): Will you relate the circumstances under which he told you that?

A. It was just a matter of conversation in the office.

Q. Well, who brought the subject up first?

A. At first? I don't remember that. He told me

(Testimony of Warren W. Butler.)

that he had previously worked on a paper called the "Tidings" where he had to punch the clock at certain times every day, and as he said, "I had somebody looking over my shoulder all the time," and he said, "I did not want to work under these kind of conditions again."

Q. Well, what did the union have to do with it; did he say in the conversation?

A. Well, he said if it was like what it was in the Guild shop that he would have to work under these conditions—I did not make the statement, he made the statement.

Q. Now, getting back to the time he was discharged, you say at that time he told you he was a member of the union? A. Yes.

Q. How did that arise?

A. Well, when I told him he was being laid off, he accused me of laying him off because he was a member of the union. He said, "Here is my button."

Q. Where was his button?

A. On his shirt.

Q. Had he just put it on in your office or was it on before? [196]

A. I don't have any idea, except prior to the time that he pulled his shirt out so as to show it to me.

Q. (By Mr. Grodsky): At what place, in what office, was Mr. Ross at the time you had notified him that he was discharged?

A. It was out in front of the Lakewood office.

Q. Which is where he is employed?

(Testimony of Warren W. Butler.)

A. Yes.

Q. You had called him out in order to tell him that? A. Yes.

Trial Examiner: Excuse me, so that we may be clear, Mr. Desfor worked where?

The Witness: In the Compton office.

Trial Examiner: And Mr. Ross worked there also?

The Witness: No, Mr. Ross never worked at the Compton office.

Trial Examiner: And Mr. Widener worked where?

The Witness: At the Compton office.

Trial Examiner: Mr. Collins?

The Witness: One or two days in the Norwalk office and then over at the Bellflower office.

Trial Examiner: And Mr. Griswold?

The Witness: Well, Mr. Griswold since his employment, has been in the Lakewood office. You see, prior to this time, he was employed by a competitor down there. The competing newspaper was sold and Mr. Griswold as a result was out of [197] a job and he came to work for us.

Trial Examiner: And Mr. Edmond, what office did he work in?

The Witness: Well, for a while he worked at the Compton office and then later out of the Downey office.

Trial Examiner: And at the time of his lay-off, he was in what office?

The Witness: The Downey office.

(Testimony of Warren W. Butler.)

Mr. Kaufman: What was that last name?

The Witness: Edmond. Could I point out something a little further?

Trial Examiner: Do you want to explain your testimony?

The Witness: Yes, he was taking care of our Paramount edition and we do not have any office in Paramount and after we tried it out for a few days, we thought it would be better to have him working out of the Downey office.

Trial Examiner: All right.

Q. (By Mr. Grodsky): Do I understand you that you were not aware of the fact that Mr. Ross was wearing the union button until after you had given him his check and told him he was discharged? A. That is right.

Q. Was the button covered up by anything; you indicated it was on his shirt?

A. No, I didn't notice it until he pulled out his shirt to [198] make it prominent.

Q. You say "he pulled out his shirt"; that again brings me back to the question: Was the button hidden by anything?

A. I don't recall that it was but I didn't see it until he did that.

Q. How long had you been in the Lakewood office that morning, Mr. Butler, before you——

A. This wasn't in the morning.

Q. How long had you been in the Lakewood office that day before you asked Mr. Ross to step outside? A. I don't think I was very long.

(Testimony of Warren W. Butler.)

Q. Was it more than ten minutes?

A. Possibly fifteen.

Q. And when you came, what was Mr. Ross doing?

A. I am not positive but it seems to me that he was talking to someone who had come in to give him some news. That is my recollection as near as I can recall.

Q. And how long was he engaged with this other person in conversation?

A. Well, it would have been ten or fifteen minutes.

Q. And as soon as he was free, you asked him to go out? A. That is right.

Q. He did not do any other work while you were there, such as making up the press?

A. Well, we have no shop in the Lakewood office. [199]

Q. Well, wasn't he preparing his story and getting ready his make-up?

A. He might have been preparing his stories but other than that—you see, the paper isn't actually made up in that office.

Q. Well, let me rephrase my question. Was he, in fact, making up the stories for the Wednesday paper?

A. It could be, I don't recall noticing what was on his desk. To the best of my recollection he was talking to someone who was in to give him some news.

Q. What day of the week was it?

(Testimony of Warren W. Butler.)

A. If I remember correctly, and I am almost positive I am right, it would be on a Tuesday.

Q. Now, on Tuesday usually the reporters in these outlying offices of yours are busy, aren't they?

A. Well, they are fairly busy every day.

Q. Aren't they especially busy on Tuesday?

A. It could be.

Q. Well, you should know. I don't want any speculation.

A. Well, it isn't something that is always necessarily true. Probably on the average it would be true. Sometimes they will work fast and they have got their work in good shape and they are through early; at other times they are slow and they are late.

Q. What time of the day was it that you were out there? [200]

A. I am not entirely positive but I would guess that it was around 4:00 o'clock.

Q. And did you advise him of his discharge before he had his stories ready?

A. Well, newspaper work is continuous. It doesn't just come up to an abrupt situation.

Q. Did you ask him whether he was ready with his work for the Wednesday paper in words or substance?

A. No, I think that he, himself, asked me whether I wanted him to do further work or not and my reply was, "Well, it is up to you, whatever you want to do yourself."

(Testimony of Warren W. Butler.)

Q. You are talking now about after the discharge?

A. Yes, that is the only conversation of that kind that we had, that I had with this man.

Q. You had no conversation with him prior to the discharge?

A. Other than to tell him we were cutting down and would have to lay him off.

Q. And it is your testimony that you did not inquire from him the status of his work for that day? A. No.

Q. Before that? A. No.

Q. You did not?

A. No, I did not inquire into the status of his work at any time before that. He only volunteered the information. [201]

Q. Now, how large is that union button, could you estimate? Would you say it is as large as a quarter?

A. If I remember now correctly, it would be approximately about the size of a quarter.

Q. And do you know what color it is?

A. No, I could not say that, I don't remember the color. As a matter of fact, to my recollection it is the only one that I have ever seen.

Trial Examiner: On this day, August 17th, was Mr. Ross wearing the jacket of his shirt?

The Witness: I don't think he was. As I remember, it was a fairly warm day and he did not have any jacket on. I could be mistaken, but that

(Testimony of Warren W. Butler.)

is my recollection. At least, he had no vest on. His shirt was open.

Q. (By Mr. Grodsky): At the time that you discharged Mr. Ross, did you tell him why he was being discharged?

A. I think I have already answered that. I told you that we were cutting down and therefore would have to let him go.

Q. Did you give him his final check?

A. No, as I remember I suggested to him that he get in touch with the Compton office and they would provide his check.

Q. Did you give him any notice?

Trial Examiner: He has testified to that already.

The Witness: Not as to when he was to stop work. As I remember, he was paid a couple of weeks in advance or something [202] of that sort.

Q. (By Trial Examiner): Well, didn't you tell him as of when he was to stop?

A. Well, I think he asked me. You remember I said he asked me whether I wanted him to finish getting out the rest of the material for that evening?

Q. Yes.

A. And I said, "You can do as you please."

Q. Yes, but the point I am trying to get at is this; did you tell him as of when he was through?

A. I think he asked that and I said, "Well, as far as I am concerned, you can finish your work right now, if that is what you would like to do."

(Testimony of Warren W. Butler.)

You see, that was after he had asked me whether I wanted him to finish up that night or not.

Q. Really what I have not got too clearly in my mind is all the details of the conversation here, but I understand that you came to the office and you and he went outside? A. That is right.

Q. In front of the office? A. Yes.

Q. Now, beginning from that point on, will you please tell me what happened between you?

A. Well, as I remember I said, "Well, we are going to have to cut the payroll as the old man tells me, because we cannot make it as it is and for that reason I am having to let you [203] go."

And he asked, "Well, do you want me to finish up tonight?" and I said, "Well, whatever you want to do. It is all right with me if you want to, and if you don't want to, it is all right with me."

Q. And the question of his pay check came up?

A. I think I stated that information as I remember it. I said, "If you get in touch with Compton, they will pay you off, and my understanding is that you will be paid up in advance in lieu of notice, and you will have this additional money."

Q. Would you be good enough to keep your voice up?

A. I will try the best I can. My voice, however, isn't a strong voice. You don't have by any chance any water around here? My throat is getting very, very dry.

* * *

(Testimony of Warren W. Butler.)

Q. (By Mr. Grodsky): Mr. Butler, did you have any responsibility in the matter of wage rate increases for employees in the editorial department?

A. From the standpoint of recommendations, I would say that was correct, yes.

Q. In other words, if you felt that an employee warranted an increase, you would [204] recommend it? A. Yes.

Q. And was your recommendation generally looked upon as favorable by management?

A. Generally I would say that would be true but not always, however.

Q. Now, during the month of July of 1954, there were some wage increases granted in the editorial department; is that correct?

A. Yes, my understanding is there were, yes.

Q. Did you have anything to say about these wage increases? A. Yes.

Q. Did you initiate the request?

A. Well, that is a little bit hard to say because Mr. Smith and I had been discussing the subject of wages, I imagine, for oh, at least four or five months prior to that time.

Q. What had caused you to discuss it for that length of time?

A. Well, the discussion I would say was rather complicated. In other words, it involved how many people it took to get out so many pages, and whether our wages were in line with the general prevailing trend, how much our business would

(Testimony of Warren W. Butler.)

stand; all these things were taken into consideration.

My concern mainly was a matter of whether I could have enough people to get out the paper.

Q. Did you have enough people at that time to get out the [205] paper?

A. Yes, I would say that I did.

Q. Let us pinpoint the time now. You say this was four or five months before July?

A. Well, there had been discussions all during that time.

* * *

Q. (By Mr. Grodsky): Now did you tell Mr. Smith in words or in substance, that were suggestive of this that you felt the staff was underpaid?

A. No, I don't think that I did, sir. It was more his position than mine. In other words, his tendency has usually been, fewer higher paid people are better than a lot of underpaid people.

Q. And did he want to increase the wages; was that the tenure of the discussions? A. Yes.

Q. And that began some time in the spring of 1954?

A. Well, I would say that I had talked to him about this at least as early as May, perhaps earlier.

Q. Did you give him reasons as to why he should not increase the wages?

A. No. I said that I hoped that in the fall we could get to a position where we could do it, but I was fearful that if [206] we had to pay more and then cut down on the number of people, that it

(Testimony of Warren W. Butler.)

would be difficult to get the papers out because I was perfectly aware that we had only a limited amount of income with which to meet the expenses.

Q. Do I understand you correctly now about what Mr. Smith said? Mr. Smith wanted to cut down on the number of the people and to increase the wages of those who remained?

A. That is right.

Q. That is what I had in mind. A. Yes.

Q. Did he specify the number of people he wanted to cut down? A. No. [207]

* * *

Q. (By Mr. Grodsky): Mr. Butler, in your discussion with Mr. [210] Smith between May and August, did the question of the number of people in the editorial department who were to be laid off, if any, was that ever discussed between you?

A. I don't ever recall a specific discussion just as to an exact number that would be laid off. Mr. Smith's main interest, as I understand it, was the total amount of the payroll and also the question of whether we were keeping in line with prevailing practices on pay.

Q. Now, in your earlier discussion did Mr. Smith tell you anything specifically with reference to the total amount of the payroll and if so, what?

A. Well, I don't think that we ever discussed the specific total figure.

Q. Well, what did you discuss?

A. Mostly there was a discussion, whenever it

(Testimony of Warren W. Butler.)

came up, of whether or not the business would stand the size of the payroll that we had and I don't think we ever used actual figures. [211]

* * *

Q. (By Mr. Grodsky): As to approximately what date is the earliest conversation between you and Mr. Smith in which the question of wage increases was discussed?

A. I said I believed it was in May. Could I point this out?

Q. Yes.

A. That this isn't the first time we have had problems with relation to wages. I have worked with Mr. Smith for eighteen years and over that period of time we have had lots of financial crises at one time or another, and it is difficult to remember what was said at a particular time, because we have been over this problem many, many times.

Trial Examiner: But, had you some conversation in May?

The Witness: Yes.

Q. (By Mr. Grodsky): How long had it been before that time that you had had such similar conversations, if you can recall?

A. I think there was a little conversation about wages—it [213] didn't amount to much—around March.

Q. But this first significant conversation which eventually resulted in the wage increase in July, was in May?

(Testimony of Warren W. Butler.)

A. That is to the best of my recollection.

Trial Examiner: Now you are in May. Get to what was said and if you don't want it, get something else.

Mr. Grodsky: All right.

Q. (By Mr. Grodsky): Now, what did Mr. Smith say to you and what did you say to Mr. Smith?

A. That is awfully difficult to remember because we had several conversations.

Q. We are talking about the first one now.

A. I appreciate you are, but to remember what particular thing was said at each conversation is very difficult. I could tell you things that were said, but to say it was at this meeting rather than this meeting is awfully hard to do.

* * *

Q. (By Mr. Grodsky): Now, Mr. Butler, do you recall any [214] specific conversation relating to the question of pay raises before the date when the pay raises were granted? A. Yes.

Q. When did that conversation take place?

A. Well, that would be very difficult to say.

Q. Bearing in mind that the pay raises were given on July 18th, was it within a week of the pay raises, within two weeks, or what?

A. No, it was some time prior to that time.

Q. Well, will you give us your best estimate of when this particular conversation which you have in mind took place?

(Testimony of Warren W. Butler.)

A. I am not sure of my recollection, but if I were trying to place it, I would say it was probably in June.

Q. Who was present in the conversation?

A. Mr. Smith and myself.

Q. And what was said; do you recall, in this conversation?

A. As I remember, Mr. Smith said my wage scale wasn't enough, that it should be higher.

Q. And what did you say?

A. I said maybe he was right and that I would look into it and bring a report back to him as to what I thought it should be.

Q. (By Trial Examiner): While we are on the subject and before we get away from it, looking at Item No. 12, are these increases as near as you can say, for a given period, that is [215] bi-weekly, monthly or what?

For example, it is noted that Jack Cleland got a $15.00 increase on July 18th; is that per week?

A. Yes.

Q. Is that true of all the other increases?

A. Yes, our pay is based on a weekly basis.

Q. It is true of all the other increases, that they were all weekly increases? A. Yes.

Q. (By Mr. Grodsky): Did you look into it and report back to Mr. Smith? A. Yes.

Q. Did you have a written report or was it just an oral report? A. A verbal report.

Q. When did you report back to Smith?

(Testimony of Warren W. Butler.)

A. Somewhere around the middle of July, I believe.

Q. Was it before or after the wage increase?

A. Oh, before.

Q. And will you tell us what you reported to him?

A. I reported to him that I thought he was correct, that we needed some wage increases.

Q. Did you discuss with him how much wage increases should be made to each person?

A. Yes, I think we sat and made out a list and discussed each [216] classification individually.

Q. (By Trial Examiner): While we are on the subject, what did you do to look into the question? What did that consist of?

A. Well, I inquired around as to what other papers were paying and that sort of thing.

Q. What other papers were those?

A. I made some inquiries about, I believe, the Herald Enterprise in Bellflower, the Norwalk Call in Norwalk, and one of the papers in Downey.

Q. Do you remember the name of the one in Downey?

A. No, at that time there were three different papers in Downey and I don't recall which one it was.

Q. You inquired, I take it, at one of them?

A. Yes.

Q. And any others?

A. I believe I looked up, as far as I could find, the record of what was being paid in Huntington

(Testimony of Warren W. Butler.)

Park and I remember discussing wages with one of the reporters of the Huntington Park papers, who came in to see me.

Q. (By Mr. Grodsky): What paper was that? The Signal?

A. Huntington Park Signal, I believe that is right.

Trial Examiner: Now, were all those comparable papers to your paper?

The Witness: Well, reasonably so. The Huntington Park [217] paper is a daily which is a different kind of operation from what we have. Our operation involves a group of papers more than a single paper.

Trial Examiner: Well, those papers on which the emphasis was on shopping information?

The Witness: That is a reasonable statement, yes.

Q. (By Mr. Grodsky): Do you know what the circulation is of the Herald Enterprise?

A. I don't believe that I have heard lately.

Q. Well, does it have a circulation that is comparable to your circulation?

A. As far as I know it isn't as large.

Q. It is a lot smaller, isn't it?

A. It is a smaller paper in size.

Q. And also in circulation, isn't it?

A. I would guess that it was. I do not have any authentic figures on it. [218]

* * *

Q. (By Mr. Grodsky): Do you know how many

(Testimony of Warren W. Butler.)

reporters are employed at the Herald Enterprise?

A. As of today I don't know.

Q. As of the time that you made your investigation in June or July?

A. There were at least three and those employees are known as "stringers."

Trial Examiner: Is that a casual or an occasional worker?

The Witness: They are paid on a space basis and every week they turn in their "string." That is where they get the name "stringers" from.

Q. (By Mr. Grodsky): Do you know how many employees there are on the Norwalk Call, that is, editorial employees?

A. I have heard numerous versions of that and I am not exactly certain of that. I do know there are at least three, but then as to whether there are any more, I am not positive of this.

Q. You don't recall now the name of the Downey paper which you made inquiry to, do you?

A. No, I am not entirely positive as I believe at that time there were three of them there.

Q. The Huntington Park Signal is a [220] daily, isn't it? A. Yes.

Q. And it has also got a Guild contract?

A. I think that is correct.

Q. In your inquiries, what did you find out about the wage scale at the Herald Enterprise?

A. I found out that it happened that they were a little bit higher than ours. That was a little bit difficult to figure because as I understand they pay

(Testimony of Warren W. Butler.)

on a monthly basis, whereas we pay on a weekly basis.

Trial Examiner: Well, broken down in terms of weekly basis, can you accurately estimate how much higher it was?

The Witness: I would say between $5.00 and $10.00 a week higher.

Q. (By Mr. Grodsky): Whom did you find this out from?

A. I believe I talked to a former employee if I remember correctly. I am not certain, however.

Trial Examiner: A former employee of yours or of the other newspaper?

The Witness: The thing I am not quite clear on—at one time I heard that the society editor on the Herald Enterprise was disengaged and I interviewed her and questioned her about wages. Now, whether that was at that time or not, I am not positive.

Q. (By Mr. Grodsky): What did you find out about the Norwalk Call with reference to their wages? [221]

A. Approximately the same, I would say.

Q. You mean they were paying about $5.00 to $10.00 per week more? A. That is right.

Q. And what did you find out about the Huntington Park Signal?

A. Well, the information there was a little bit uncertain. That is, in other words, as near as I could understand it from the way the reporter explained it to me, their rate for beginning people

(Testimony of Warren W. Butler.)

would be somewhat lower than ours, but their rate for the long time people would be a little bit higher.

Q. When you say "a little bit higher" what do you mean by that?

A. I am trying to remember the figures. Please do not say that this is the accurate figure, but I am just trying to give you a relationship. As I remember, with the exception of Mr. Cleland and Mr. Sheets, the highest of the other people were around $80.00 per week, that is our people.

And the highest in Huntington Park was somewhere between $90.00 and $95.00. That is my recollection. It is something like that.

Q. Why did you except Mr. Cleland and Mr. Sheets?

A. Well, they have certain duties in coordinating material and for that reason we pay them a little more.

Q. Is your company a member of the California Newspaper Publishers' Association? [222]

A. I think that we are, but I don't know that of my own knowledge.

Q. Do you know whether the California Newspaper Publishers' Association supplies its members with information as to wages of reporters on various newspapers, its member papers?

A. I imagine they do.

Q. Do you know whether such information was available to you? I will just put it this way.

A. Well, the only thing that I can recall about that, I think I had discussed it at one time with

(Testimony of Warren W. Butler.)

Mr. Brewer something about what he had from that association and he said, "Well, I had a representative from the C.N.P.A. and that was approximately correct."

Q. (By Trial Examiner): You had already checked with the other newspapers or people connected with the other newspapers?

A. Yes, I had talked with the reporters about what the wage rate was.

Q. Before we leave the question of wage increases, and I am hoping that we may do so soon, I notice here in General Counsel's Exhibit No. 6 for item 7, that all but two individuals were increased on July 18th, 1954; some got the increases later, but they did get increases on July 18th.

Will you look at it, please, and will you tell me whether that substantially constituted those who were increased on July 18th of almost all of the non-supervisory employees of the Herald [223] American?

A. It included most of them as I recall. I remember specifically Mr. Desfor, and I said to Mr. Smith that I didn't know how he was going to do and I didn't know if he would stay with us and so I did not recommend an increase at that time.

Q. Anybody else?

A. It seems to me that there was somebody else, but I don't remember who it was.

Q. Then I take it your answer was it included all with the exception of one or two?

A. I believe that is right.

(Testimony of Warren W. Butler.)

Q. I have one more question. Marion Mattison, I see, had an increase on July 8th instead of July 18th. A. July 8th?

Q. Yes, she was given a $10.00 raise on July 8th.

A. That is something that I don't remember.

Q. All right. I notice that Helen Farlow was increased not on July 18th but October 24 and it may be that she wasn't employed there on July 18th.

A. Helen Farlow was out of our employment, I imagine, two or three months and she came back. She has been with us off and on for some sixteen years I think.

Q. Do I understand that your best recollection is that she wasn't with you on July 18th? [224]

A. Well, I could not be positive on that. I know that it was somewhere in the general vicinity of that time, but I do not recall the time.

* * *

Q. (By Mr. Grodsky): How long after the wage increases were given on July 18th did you determine that there—that it would be necessary to cut staff?

A. Well, I would not say—it is one of these things that [225] you cannot just shut down a curtain and say, "This is the time it happened." As I told you before, we had discussions at various different meetings.

Q. Were all these discussions after July 18th?

(Testimony of Warren W. Butler.)

A. I would guess that it was at least one week prior to that time, but I would not be positive.

Q. Which related to the cutting of staff?

A. You see, business began to drop off around the 1st of July, as I told you.

Q. Did you protest the idea of granting wage increases at a time that you were talking about the cutting of staff?

A. No, I don't believe that I did because by this time I had this information and I thought there was some justification for the feeling that there should be more money paid.

Mr. Grodsky: I will now have this marked General Counsel's Exhibit No. 9 for identification.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

Q. (By Mr. Grodsky): I show you what has been marked for identification as General Counsel's Exhibit No. 9 for identification and ask you if that is the kind of button which you saw Mr. Ross wearing on the day when you discharged him?

A. I believe that is the kind of a button that he showed me at the time.

Trial Examiner: I would suggest that you affix that [226] firmly to a piece of paper and tab it "General Counsel's Exhibit No. 9."

Mr. Grodsky: I will do that, and I will offer it at this time.

Trial Examiner: Any objection?

(Testimony of Warren W. Butler.)

Mr. Kaufman: What, to a union button?

Trial Examiner: To the admission of the button? It will be received.

(The document heretofore marked General Counsel's Exhibit No. 9 for identification was received in evidence.)

Q. (By Mr. Grodsky): Now you mentioned before in your testimony with reference to the reporters that you had looked to the figure of the Huntington Park Signal for their older employees.

How many employees do you have in your organization who were more than five years in service with you? A. I really don't know that.

Q. Well, Mr. Cleland was more than five years, wasn't he? A. Very definitely.

Q. Mr. Sheets was more than five years, wasn't he, or approximately that?

A. Yes, I believe so.

Q. And on the occasions when Helen Farlow worked there, she was there over five years considering everything?

A. Oh, yes, considering everything, she had worked longer [227] there than anybody else.

Q. Can you think of anybody else apart from those three, who have been there longer than five years?

A. I am not sure of the figures but if I were guessing I would say that some of them had been there pretty close to that.

Q. Now, did you know that the Guild contract

(Testimony of Warren W. Butler.)

by Huntington Park Signal has graduated pay scales by the number of years of employment?

A. I believe that gentleman told me, but the thing I am not clear on is whether that goes to the employee's employment with that newspaper or whether it is for the number of years of experience in the business.

Q. Now, before the wage increases were given, what was the wage of—well, let us take Mr. Ross, if you remember his wage, since he is no longer an employee?

A. I don't think I can remember that.

Q. Do you remember the wage rate of any employee? A. Not without consulting records.

Q. Do you have any of the records here?

A. Nothing other than what I have seen on the sheet. [228]

* * *

Q. (By Mr. Grodsky): Now, after Mr. Ross was discharged—strike that. When you hired Earl Griswold, did you have him in mind for the Lakewood job?

A. As a matter of fact, I did not hire Mr. Griswold.

Q. Do you know whether he was hired with that specific job in mind?

A. I would imagine so because he had been working for a competing paper in that capacity.

* * *

(Testimony of Warren W. Butler.)

Cross-Examination

By Mr. Kaufman:

Q. Mr. Butler, did you on any occasion or any one under your instructions, discharge Sol London, Raymond J. Ross, Doris Hickey or Doris Farley because they were engaged in concerted activities with other employees for [229] the purposes of collective bargaining and other mutual aid and protection?

Mr. Grodsky: I will object to that question, as I think that——

Trial Examiner: I will overrule it.

The Witness: The answer is "no" with this stipulation, that I did not dismiss all of them.

Q. (By Mr. Kaufman): The ones that you knew about or dismissed, your answer would still be "no"? A. That is right.

Q. Do you know if anybody else in the organization fired any one because of union activities?

A. Not to my knowledge.

Q. Did you on July 12th or any other date, question employees as to whether they had joined the union for the purposes of finding out, so that you could fire them? A. No.

Q. Did you ever make a statement on July 17th or any other date, that Mr. London had been discharged for attempting to organize for the Guild?

A. No.

(Testimony of Warren W. Butler.)

Q. Was Mr. London discharged specifically for any attempt to organize for the Guild?

A. No.

Q. Did you have Lou Murray attempt a surveillance of a union [230] meeting on or about July 17th, 1954, or any other date?

A. Mr. Murray isn't under my direction and I did not.

Q. Were any wage increases granted by you or under your direction or with your consent as a means of combating unionism on or about July 17th, 1954, or thereafter?

A. No, I believe I explained the basis for the wage increases.

Q. Now, Mr. Butler, did you have a conversation with Mr. Fleener relative to the discharge of Mr. London?

A. It was mainly a one-sided conversation on the part of Mr. Fleener.

Q. Did you have such a conversation?

A. Yes.

Q. As best as you can remember it, would you tell me about that conversation?

Mr. Grodsky: I object, there is no foundation as to date.

Trial Examiner: Well, we know what counsel is getting at but it would be helpful if you placed the date because if you don't ask him, I will.

You can have an answer to this question and I will overrule the objection.

Mr. Kaufman: Right.

(Testimony of Warren W. Butler.)

The Witness: I am not quite certain as to the question.

Q. (By Mr. Kaufman): You will remember that Mr. Fleener said he had a conversation with you an hour or two after Mr. [231] London was fired?

A. Mr. Fleener approached me and asked me about it.

Q. Yes, do you remember that incident?

A. Yes.

Q. Would you tell me your version of the Fleener conversation or whatever you call it?

A. He asked me if Mr. London had been dismissed.

Q. Yes.

A. And then he said something about, "Did the union have anything to do with it?" or something of that sort, and I said, "Well, no, not as to the dismissal."

"Well," he said, "Is Sol mixed up with the union" and I said, "I don't know anything about it other than I had some reports that he was soliciting membership in the office during the time that he should have been working."

Q. Now, sir, isn't it a fact that after the discharges—strike that. There were other people fired at or about the same time that Doris Hickey and—I mean Gloria Hickey and Doris Farley were fired; that is around the middle of August; isn't that correct?

(Testimony of Warren W. Butler.)

Mr. Grodsky: I object. There is an objection pending.

Trial Examiner: You are objecting?

Mr. Grodsky: Yes.

Trial Examiner: Well, for one thing, you, yourself, brought that out and counsel would be entitled to address [232] himself to it for that reason if no other.

You brought out, for example, or it was brought out in direct examination that William Edmond was terminated on August 18th.

Mr. Grodsky: Yes. Well, his question is too vague because he just specified around the middle of August.

Trial Examiner: Then if it is too vague to amount to anything, he may be damaging his case. I will take the testimony.

Mr. Grodsky: All right.

The Witness: It may be too late for the witness to answer.

Mr. Kaufman: Well, I will rephrase it.

The Witness: I wish you would.

Q. (By Mr. Kaufman): It has been alleged that on or about August 18th, the newspapers fired, or Mr. Smith fired, some employees for union activities.

Now I believe you testified that they were not discharged for union activities as of that date?

A. That is right.

Q. Now, isn't it a fact that other employees on or about August 18th were also discharged?

(Testimony of Warren W. Butler.)

A. It was my understanding that there were. In this conversation with Mr. Smith, about having to cut down the payroll, he said it did not pertain only to me but to other departments as well, that they were having the same thing to [233] do.

Q. You know don't you, that other departments did fire employees? A. Oh, yes.

Q. And on or about the 18th, the same date?

A. As I recall it, yes. I didn't pay a great deal of attention to the other people because I was only interested in my own staff.

Q. And you operated thereafter with actually less personnel in numbers than you had before; is that a correct statement? A. That is right.

Trial Examiner: Well, for how long or permanently or what?

The Witness: I don't think I have of this date, I have as many as I had then, if my memory serves me correctly.

Trial Examiner: Well, before we get away from this subject, I am a little bit vague about who else was dismissed, in other words, and perhaps this witness can identify for me on General Counsel's Exhibit No. 6 who besides Sol London, Helen Farley, Raymond Ross, and perhaps one other, was dismissed about August 17th?

The Witness: Well, now——

Mr. Kaufman: Well, see, these people are editorial.

The Witness: The other people it would be hearsay with me. [234]

(Testimony of Warren W. Butler.)

Trial Examiner: That is what is troubling me.

The Witness: They weren't in my department and I wasn't directly concerned with them.

Trial Examiner: That is what is troubling me because this General Counsel's Exhibit No. 6 isn't confined to the editorial people, namely, "Name and date of termination of all classified advertising solicitors terminated after August 1, 1954," under which the name of only one appears and she is alleged to be unlawfully discharged.

What is troubling me, in other words, this witness has testified to some hearsay testimony which doesn't appear to correspond to the document the respondent made up.

Mr. Kaufman: Well, I think it does because we have other classifications, 9, 10, and 11, PBX operators and cashiers terminated.

Trial Examiner: As I say, you have one.

Mr. Kaufman: Yes.

Trial Examiner: Helen Larson and that is the reason I gave this to the witness so that he can use it to refresh his memory perhaps as to what he had heard and from whom and so on.

Well, in any event, thus far I have some hearsay from this witness on some people and I cannot base any finding on it.

Mr. Kaufman: I appreciate that but you also have more than hearsay, you have an exhibit. [235]

Trial Examiner: I may have an exhibit, I must agree, but I am now referring to this witness' testimony.

(Testimony of Warren W. Butler.)

Mr. Kaufman: All right, I understand that.

Q. (By Mr. Kaufman): You made the decision did you, to fire Mr. Ross? A. That is correct.

Q. You were merely told, I believe your testimony was, to fire someone by Mr. Smith?

A. Well, we had to cut down the payroll.

Q. But that was your decision and it wasn't based on any union activities whatsoever; is that correct? A. That is right.

Mr. Kaufman: I have no further questions.

Trial Examiner: Anything else, Mr. Grodsky?

Mr. Grodsky: Yes.

Redirect Examination

By Mr. Grodsky:

Q. You told us pretty much of what Mr. Fleener told you, but I failed to get what you told him. Now, when Mr. Fleener said he heard that Sol London was discharged, what did you tell him?

A. I told him that it was correct.

Q. Then he asked you whether it was for union activities? A. Yes, as I recall.

Q. And what did you say to him?

A. I said, "No, it wasn't for union activities."

Q. All right. Did you say anything further?

A. Then he asked me another question and said, "Wasn't he active in the union"?

Q. Yes.

A. And I made the statement, "Well, the only thing I know is that I have heard reports that he

(Testimony of Warren W. Butler.)

was soliciting membership in the office during hours that he should have been performing his work."

Trial Examiner: Well, in words or in substance, did you tell him that that was a reason why he was discharged?

The Witness: No, I did not make that statement. He could possibly have assumed that.

Trial Examiner: No, do not tell us what he assumed. I only want to know what you did.

The Witness: I did not tell him anything.

Trial Examiner: Go ahead, anything else?

Mr. Grodsky: Nothing more.

Trial Examiner: I have only one question.

Q. (By Trial Examiner): If I understand the testimony here correctly, Mr. Ross' work week, in the week he was discharged, was scheduled to expire the following Saturday; is that correct?

A. That is right.

Q. I take notice that August 17th was on Tuesday. A. That is right. [237]

Q. Now, can you tell me or can you account for the fact that Mr. Ross was paid for the balance of that week, that work week, plus some more?

You testified he was given two weeks' pay or thereabouts. Can you account for the fact that he was paid for the balance of the work week, why he was paid for the balance of that work week?

A. He raised the question, "Do you want me to quit just now or do you want me to finish the paper" and I said, "Well, do just what you think."

Q. Well, that is my point. Can you account for

(Testimony of Warren W. Butler.)

the fact that you did not require him to work the rest of the week?

A. I do not believe I felt it was too material one way or another. He raised the question himself in the first place and I did not want to have any argument with him. I said, "Well, if you want to quit now, that is perfectly all right with me."

Trial Examiner: All right. Anything else of this witness?

Mr. Grodsky: I have one more question.

Q. (By Mr. Grodsky): Is Wednesday the make-up day?

A. Well, actually we start making up papers some time on Tuesday afternoon usually and it continues on until late on Wednesday night.

Q. And your experienced reporters are very necessary on the [238] job for the make-up; isn't that correct?

A. Well, not necessarily. You see, Mr. Sheets for example, was very familiar with Lakewood and the reason that I did not press Mr. Ross to stay the following day was because I knew that Mr. Sheets could make-up for him any way, so that it would not make too much material difference.

Q. When Maxine Galt quit on the Tuesday, you felt differently about it?

A. Well, then I did not have anybody who was familiar with what we did in our "string" service, who would know the material sufficiently well to do

(Testimony of Warren W. Butler.)

a good job of make-up. I did not dismiss her as of Tuesday.

I think I notified her on Monday that she would be through at the end of the week. She left of her own volition on Tuesday afternoon.

Q. (By Trial Examiner): Well, you know who finished up Mr. Ross' work. I got the impression that there was some work he did not complete.

A. I don't think there was. As a matter of fact, if I remember correctly, Mr. Ross was in the office the following morning.

Q. On Wednesday? A. Yes.

Q. Working?

A. I don't think he was working. I think he came in to [239] advise Mr. Sheets about some things that had to be done, about where they should be.

Q. Well, do you in truth and in fact know that anybody else finished up some work for him that was necessary as a part of the make-up?

A. Well, they must have because to my knowledge he was only in the office a few minutes the following morning and the make-up would take one or two hours.

Q. And do you know who did do that?

A. Mr. Sheets was at the position where the make-up would be done. He was in the proper position to do so.

* * *

DORIS FARLEY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * *

By Mr. Grodsky:

Q. What is your name? [240]

A. Doris Farley.

Q. And your address?

A. 67 West Sixty-first Street, Long Beach.

Mr. Kaufman: Doris Connelly?

The Witness: Doris Farley.

Q. (By Mr. Grodsky): When were you employed by the Herald American Company?

A. Mr. Brewer.

Q. When? A. My first day was June 28th.

Q. Of 1954? A. Yes.

Q. In what capacity were you employed?

A. PBX and cashier.

Q. Do you know a Mr. Lugoff who is with the company? A. Yes.

Q. Do you know what his job is?

A. Classified manager, I believe.

Q. Did you ever hear him make any statement with reference to the Guild?

Mr. Kaufman: Just a moment, please.

Trial Examiner: Do not answer the question until I tell you.

The Witness: O.K.

(Testimony of Doris Farley.)

Mr. Kaufman: Your Honor, would you have the reporter read [241] back the question to me, please?

Trial Examiner: Sure.

(Question read.)

Mr. Kaufman: Continue.

Trial Examiner: Go ahead, answer.

The Witness: Not to me he didn't but I heard him to Gloria Hickey.

Trial Examiner: The question is, "Did you hear it"?

The Witness: Yes, part of it.

Q. (By Mr. Grodsky): When did you hear him make the statement that you have in mind?

A. I heard one the first week I went to work there. I don't know what day it was.

Mr. Kaufman: What date was it?

The Witness: 28th June, I started there and it was in the following week.

Q. (By Mr. Grodsky): Now, to whom was Mr. Lugoff talking to? A. Gloria Hickey.

Q. Where were you employed?

A. Half way across the office from her.

Q. No, in what office were you employed?

A. Bellflower.

Q. Where did this conversation between Gloria Hickey and Mr. Lugoff take place?

A. By her desk in the Bellflower office. [242]

Q. And where were you standing or sitting when you heard the conversation?

A. I was putting the day before's issue of the

(Testimony of Doris Farley.)

paper on the file. They have a place for it there.

Q. And what did you hear Mr. Lugoff say?

A. I don't remember his exact words, but he asker her did she know anything about it, and who was involved.

Q. Who said did she have anything to do with it?

A. I didn't pay too much attention to that conversation because I wasn't interested.

Q. Did you hear anything further in the same conversation then?

A. I didn't hear her answer because I had to go to the phone. He said he was glad she wasn't, because Colonel Smith was going to fire, if he did not find out who it was, he was going to fire the whole God-damned department.

Trial Examiner: Just search your recollection and tell us as nearly as you can remember.

The Witness: The only exact words I heard was that he would fire the whole God-damned department.

Q. (By Mr. Grodsky): Who?

A. If he couldn't find out who was involved.

Q. Who? A. The people in the Guild.

Q. Did he say "in the Guild"? [243]

A. No, I just remember that one phrase. It stuck with me.

Q. I show you General Counsel's Exhibit No. 9 which is a union button and ask you whether you, at any time during your employment, wore a similar button? A. August 17th.

(Testimony of Doris Farley.)

Q. And was that as a result of a prearrangement? A. Yes, of the night before.

Q. What had happened the night before?

A. We had a union meeting the night before at Gloria's home in Norwalk.

* * *

Q. (By Mr. Grodsky): Did anybody else in your office wear a union button? A. Yes.

Q. Who? A. Gloria Hickey and myself.

Q. You were the only two? A. Yes.

Q. Did Gloria Hickey wear a button on any date before 17th August?

A. No, I don't believe so. I don't think so.

Trial Examiner: Did you? [244]

The Witness: No, I started to the day before and I decided I would not.

Trial Examiner: You started to on August 16th?

The Witness: Yes.

Q. (By Mr. Grodsky): Where did you wear your union button and by "where" I mean on what part of your clothing? A. On my belt.

Q. Was it exposed on your belt? A. Yes.

Q. When were you discharged?

A. The morning of August 18th.

Q. Now, beginning with the morning of August 18th—oh, strike that.

Do you know whether Gloria Hickey was discharged——

A. She was discharged the same morning as I was.

(Testimony of Doris Farley.)

Q. Do you know that? A. Yes.

Q. Were you present then? A. Yes.

Q. Was she discharged before you or after?

A. Before.

Q. At what time of the morning was Gloria Hickey discharged?

A. Between fifteen until 9:00 and 9:00.

Q. By whom was she discharged?

A. Mr. Lugoff. [245]

Q. Was there any conversation between Mr. Lugoff and Gloria Hickey?

A. I didn't hear the first of the conversation because I was across the office.

Q. Did you hear part of the conversation?

A. Yes.

Q. Will you tell us what you heard?

A. He was telling Gloria that he was very satisfied with her work and he liked her very much and he was sorry he had to let her go but it was for economic measures.

She told him that it wasn't and oh, I don't remember, let me see——

Trial Examiner: Take your time.

The Witness: I think she called the Guild headquarters and charged it to her phone and told Mr. Lugoff she was going up there as soon as she left the office.

He told her it would not do her any good because he had been in the same position—I forget how many years ago—and nothing had come from that.

(Testimony of Doris Farley.)

Q. (By Mr. Grodsky): Did you have any conversation with Mr. Lugoff?

A. Yes, I asked him if he was going to fire me, too.

Q. What did he say?

A. He said he wasn't my boss.

Q. What happened then? [246]

A. He made a telephone call and I had to go to the switchboard to give him a line, so I did not hear any of the conversation until he told somebody, "Hurry on down. I am here waiting for you." I don't know who the person was.

Q. What happened next with reference to your discharge?

A. I don't believe it was more than fifteen minutes later that Mr. Murray arrived.

Q. What relationship did he bear to you; was he your boss?

A. I don't believe he was. I don't know.

Q. After he arrived what, if anything, did he say or do?

A. Well, we exchanged "Good mornings" and I asked him did he have any check for me, and he said something, he said he did have it and he gave it to me.

Then he asked me to turn over the keys of the petty cash box to him.

Q. And you did that? A. Yes.

Q. Did you have any conversation with him?

A. Not at that time. I closed the board and

(Testimony of Doris Farley.)

showed another girl how to put the lines so that she could take it herself.

I went up and I was talking to him, then I said, "I don't think it is for economic measures that you are firing me for."

Trial Examiner: This is when you asked him for your check? [247]

The Witness: Yes. He said, "This is for economic measures." I said, "I do not believe it is for that." And he said, "If economic measures doesn't hold up, we will go into the efficiency of your work."

Q. (By Mr. Grodsky): During the time of your employment were you ever criticized by any representative of the management with reference to the performance of your duty? A. No.

Mr. Grodsky: I have no further questions.

Cross-Examination

By Mr. Kaufman:

Q. Is it Mrs. Farley? A. Yes.

Q. Is there a Mr. Farley?

A. Yes, there is.

Q. You live in Compton? A. Yes.

Q. How long had you worked for the paper?

A. I started on 28th June up until the morning of August 18th.

Q. So that would be almost two months; is that right? A. Yes.

Q. As I compute it, right? A. Yes.

(Testimony of Doris Farley.)

Q. I suppose you would be called a rather new employee; is that correct? [248] A. Yes.

Q. And on this first conversation that you overheard, you have tried to be very fair and I appreciate that too, and I believe you said that you were quite a distance away; is that right?

A. Not at the time I heard that phrase, no.

Q. When they first started to talk, and I mean by that Gloria Hickey and Mr. Lugoff, how far were you from them?

A. About as far from you to me.

Q. Were they talking as loudly as I am?

A. A little louder.

Trial Examiner: I would estimate that that is sixteen to twenty feet, the distance between them. Is that agreed?

Mr. Kaufman: No, it isn't. I would say that it would be closer to twelve to fifteen feet.

Trial Examiner: That the witness is from you?

Mr. Kaufman: Yes.

Trial Examiner: All right, I will accept your estimate.

Mr. Kaufman: All right, thank you.

Q. (By Mr. Kaufman): So you would say about twelve to fifteen feet way?

A. I don't know about that.

Q. Could you hear very clearly? A. Yes.

Q. Was it noisy there? [249] A. No.

Q. Very quiet like in here now?

A. Well, not as quiet as this.

Q. Could you hear them speaking very clearly?

(Testimony of Doris Farley.)

A. I didn't hear what Gloria said.

Q. Now, just tell me exactly again how much of the conversation, if any, you did hear.

A. I didn't hear Gloria say anything.

Q. Fine. A. I was going back and forth.

Q. She was talking but you didn't hear her, is that it?

A. I did not say that. I didn't pay any attention to her because I wasn't interested.

Q. You did hear a few phrases of Mr. Lugoff's?

A. Yes.

Q. Will you explain to me the first conversation that you had with Mr. Lugoff?

A. I was over there on that side of the office (indicating).

Q. "Over there" means nothing to me. You did hear some of the conversation, is that right, Mrs. Farley? A. Yes.

Q. I want the first words as best as you remember them, that you heard. I don't want to know where you were or anything else. I only want the first words you heard.

A. This is the best that I can recall. He said, "Gloria, [250] do you know anything about this Guild business?"

Q. At that time, where were you in distance from Mr. Lugoff and Gloria Hickey?

A. I was closer at that time because I had just been introduced to him.

Q. How close?

(Testimony of Doris Farley.)

A. This close I think (indicating). We shook hands.

Trial Examiner: Do you mean to the reporter?

The Witness: Yes.

Trial Examiner: Is that right?

The Witness: Yes.

Trial Examiner: Well, that is about a yard.

Q. (By Mr. Kaufman): Then he said, "Do you have anything to do with the Guild business?" I think. A. Yes.

Q. What did she say to that?

A. "Why, Mr. Lugoff * * *" and at that time I left.

Q. And actually—I know you were not thinking then—but actually you did hear Miss Hickey say something, didn't you? A. I suppose so.

Q. But a moment ago you had told me you heard her say nothing.

A. She didn't say "yes" or "no."

Q. But a moment ago you said you did not hear her say [251] anything; isn't that a correct statement of your testimony?

Mr. Grodsky: No, she said she didn't hear her say any words.

Q. (By Mr. Kaufman): Am I correct in stating that originally you were in error and that you now were close to the two parties talking at one time and you heard her answer?

Mr. Grodsky: I object to the question on the ground that it starts out with a conclusion, "Originally you were in error."

(Testimony of Doris Farley.)

Trial Examiner: All that she has to do here is to say whether counsel's statement is correct. That is all you have to do.

Mr. Grodsky: I will object to it further on the grounds that it is incompetent.

Trial Examiner: All right, I will overrule it.

I am going to have the question read to you. You listen to it and give your best answer.

(Question read.)

The Witness: Well, I am going to have to explain this. When he asked me the question, while—well, I thought it was about what he said that Colonel Smith had said——

Trial Examiner: You mean what you heard later on; what you testified you heard later on?

The Witness: Yes.

Trial Examiner: Go ahead. [252]

Q. (By Mr. Kaufman): I want to be fair to you but I want you to be fair to me, if you can. If you don't understand my questions, will you stop me, please.

Let me start again. The first thing that you heard was a conversation between Mr. Lugoff and Miss Hickey; is that correct?

A. That was the first that I remembered anything about. I suppose there were other words said that I do not remember.

Trial Examiner: Well, you do not have to guess at anything else that was said.

(Testimony of Doris Farley.)

The Witness: That was the first phrase that had anything to do with the Guild that I had heard.

Trial Examiner: Go ahead, sir.

Q. (By Mr. Kaufman): You were present that day and remember part of a conversation; is that a correct statement? A. Yes.

Q. Now the first thing that you heard that you remember you can place, when you were very close to both parties was, to wit, Miss Hickey and Mr. Lugoff talking? A. Yes.

Q. Now, please repeat that conversation.

Mr. Grodsky: I object to it. It has been asked and answered.

Mr. Kaufman: I don't think so because I am attempting to go through this in an orderly manner because she said she was [253] confused before.

Trial Examiner: She has already testified to it on your interrogation.

Mr. Kaufman: But she then said she was confused.

* * *

Q. (By Mr. Kaufman): The conversation is what I am interested in, the one part that you heard when you were standing a few feet away from the two parties. A. All of it?

Q. Yes.

A. Mr. Lugoff said he was very glad to know me and that he hoped I would be happy here. And I said, "Thank you." He then turned to Gloria and said, "Have you had anything to do [254] with the Guild activities that have been going on around

(Testimony of Doris Farley.)

here?" And she said, "Why, Mr. Lugoff * * *" And I went to answer the switchboard and came back later.

Q. How much later did you come back?

A. About one and a half minutes.

Q. What did you do during that minute and a half?

A. I said "Good morning, Herald American," and gave the line that they asked.

Q. You were at the switchboard? A. Yes.

Q. When you came back, how far away from Doris Hickey and Lugoff were you?

A. From me to you.

Q. At that time were you doing any work?

A. I was putting a newspaper on a file.

Q. At the same time you were listening whether inadvertently or otherwise, to a conversation between Mr. Lugoff and Miss Hickey? A. Yes.

Q. And were you trying to hear what they said?

A. No.

Q. Whatever you did hear was inadvertent?

A. I can say that I may have heard something but it didn't stick with me because at that time I wasn't interested.

Q. Would it be fair to say you were paying very little [255] attention to the conversation?

A. I suppose.

Q. Do you remember?

A. I remember the few phrases.

Q. What is the phrase you heard the second time?

* * *

(Testimony of Doris Farley.)

Q. Do you know a party by the name of Fitzgerald? A. No.

Q. It is Mrs. Fitzgerald; does that refresh your memory? A. Marjory?

Trial Examiner: Well, he knows somebody called [256] "Fitzgerald" and you know somebody called "Marjory." That wasn't Mr. Kaufman's question. Mr. Kaufman's was, "Do you know anybody by the name of Fitzgerald?"

The Witness: I believe that is her last name.

Q. (By Mr. Kaufman): Did she wear a union button? A. Oh, yes. [257]

* * *

GLORIA HICKEY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you state your name and address, please?

A. 11432 McLauren Avenue, Norwalk.

Q. Will you speak up so that everybody will hear you? A. Yes.

Mr. Kaufman: I didn't get her address.

The Witness: 11432 McLauren Avenue, Norwalk.

(Testimony of Gloria Hickey.)

Q. (By Mr. Grodsky): When were you employed by the Herald American?

A. March, 1954.

Q. And in what capacity?

A. Classified advertising sales.

Q. And you worked there until you were discharged on August 18th?

A. In the morning, yes.

Q. Of 1954? A. Yes. [264]

Q. During your period of employment, did you have any conversation with any supervisor with reference to the Guild?

A. Yes, Mr. Leonard Lugoff, my immediate boss.

Q. Where did this conversation take place?

A. At the Bellflower office of the Herald American newspaper.

Q. And that is the office in which you were employed? A. Yes.

Q. When did this conversation take place, to the best of your recollection?

A. I believe it was in July. I don't recall the exact date. I didn't feel at the time I would have any reason to remember the exact date.

* * *

Q. (By Mr. Grodsky): Who else was present in the Bellflower [265] office at the time of your conversation, within your recollection?

A. Doris Farley was present. I believe Dorothy Bush was present, but I cannot say definitely.

Q. What did Mr. Lugoff say to you with refer-

(Testimony of Gloria Hickey.)

ence to the Guild, and what, if anything, did you say to him? Give us the entire conversation.

Mr. Kaufman: Would we place the date of this?

Trial Examiner: Yes, it was an estimated date. It was some time in July but the witness said she didn't know the exact date.

Mr. Kaufman: All right.

The Witness: Mr. Lugoff came into the office. Doris Farley and he and I were talking. He asked me if I had any connection with the Guild and I told him I did not.

He said he certainly hoped that I did not because it would mean immediate dismissal, for anyone else connected with the Guild activities.

He said that he knew there were Guild activities going on, possibly centered in the North Long Beach and Bellflower offices and that Colonel Smith had told him to fire his whole God-damned classified department if he had to, to find out who was responsible for it and to get rid of all of them if he had to.

Q. (By Mr. Grodsky): Now, will you describe the events [266] leading up to your termination?

A. On the afternoon of August 17th, I telephoned Mr. Lugoff at the Compton office to turn in my line count as was customary. This was about 6:00 o'clock in the evening. And he asked me to wait as he wanted to come out and talk to me.

I told him I was real sorry but that I had things to do and I couldn't wait for him but that I would come into the Compton office and talk to him later, and

(Testimony of Gloria Hickey.)

he said, "No," that he would see me the next morning.

Q. Did he see you the next morning?

A. Yes, on the morning of the 18th when I went to work around 8:30, Mr. Lugoff came in approximately fifteen minutes later.

Q. Will you describe what took place at that time? [267]

* * *

The Witness: He came into the office at approximately 8:45 and I told him, "Good morning," and asked him if he had my checks and he said "Yes," and handed them to me. And I said, "Well, you are firing me because I am wearing a Guild button," which I had on.

And he said, "Well, I am very sorry to have to let you go but Colonel Smith ordered it." And Doris Farley came over and said, "I am wearing one, too, are you going to give me my checks?" And he said, "I am not your boss."

Then he sat down at one of the desks behind mine and made a phone call and he said, "I am asking for Lou Murray." And then he said——

Mr. Kaufman: Now, just a minute. I submit that a conversation between Mr. Lugoff and somebody unknown over the telephone is objectionable to as there is not sufficient foundation laid and it is hearsay.

Trial Examiner: If that is the ground of your objection, I will overrule it. [268]

(Testimony of Gloria Hickey.)

Mr. Kaufman: Furthermore, that there is no—no, I have nothing further to say.

Trial Examiner: I might add that this doesn't necessarily go to the question as to whether or not he actually spoke to Mr. Murray. She is testifying to what she heard.

Mr. Kaufman: All right.

Trial Examiner: Continue, please.

The Witness: I heard him say, "Come over. I am waiting for you." And shortly after that, Mr. Murray arrived in the office.

Trial Examiner: Well, I think you have now gone beyond the question which was asked of you.

Q. (By Mr. Grodsky): Now, were you present when Doris Farley was discharged?

A. Yes, I was.

Q. About how long after your discharge did that discharge take place?

A. I would say within twenty minutes.

Q. Who discharged her?

A. Mr. Lou Murray.

Q. Did you overhear the conversation between Mr. Murray and Mrs. Farley? A. I did.

Q. Will you tell us that conversation?

A. Mr. Murray came into the office and gave her her checks. [269] And she said, "It is because I am wearing a Guild button, isn't it?" or words to that effect and Mr. Murray refused to answer.

Q. Did he say something?

A. Well, not at that particular moment. He told her to shut the switchboard off and he started

(Testimony of Gloria Hickey.)

counting the cash in the cash box, and we continued talking to him.

And she said, "My work is satisfactory, isn't it?" He said, "You are being discharged because of an economy measure. We may have to go into it later."

Q. Now, you testified that you and Doris Farley were wearing the union button on the day of your discharge, which was on the 18th.

Now, had you worn the union button at any other time? A. We wore it all day on the 17th.

Q. Did you wear it before the 17th?

A. I wore mine on the afternoon of the 16th.

Q. But before the 16th, did you or Doris Farley ever wear your union buttons?

A. We did not even have one before that.

Q. Now, when you received your checks, do you recall what date the checks were dated?

A. August 17th, 1954. [270]

* * *

Cross-Examination

By Mr. Kaufman:

Q. It is Mrs. Hickey, is it not?

A. That is correct.

Q. Is there a Mr. Hickey? A. Yes. [271]

* * *

Q. Now, Mrs. Hickey, when you had this alleged discussion with Mr. Lugoff, I believe you stated it was in July? A. Yes.

Q. You had been working there for some time;

(Testimony of Gloria Hickey.)

is that correct? A. Yes.

Q. And where did this discussion take place?

A. In the Bellflower office of the Herald American.

Q. What part of the office?

A. I would say behind the counter in the front of the office.

Q. Do you recollect that that is where it was?

A. Yes, it was around the counter at the front of the office.

Q. You do remember?

A. Yes. It wasn't at my desk.

Q. Were you standing during the conversation?

A. Yes, I was.

Q. Where was Mrs. Farley?

A. She was standing by the switchboard.

Q. How far is that from where you were talking?

A. I don't know. I would say about as far as to Mr. Grodsky [275] but I don't know how far that would be.

Q. Would you say about eight feet?

* * *

Q. (By Mr. Kaufman): And where was Dorothy Bush?

A. I said I wasn't sure if she was in the office. I think she was in the office. Dorothy was usually in when Mr. Lugoff came around.

Q. Do you remember whether you saw her or not? A. Not definitely.

Q. So then you could not place where she was, of course? A. No.

(Testimony of Gloria Hickey.)

Q. Now, who opened the conversation, Mr. Lugoff or yourself?

A. I don't remember exactly.

Q. Well, do you recall any parts of the conversation?

A. Well, we always discussed classified advertising.

Q. I am not talking about what you always discussed. You did have a particular conversation that morning? A. Relating to the Guild?

Q. Was it in the morning?

A. Yes, around 11:00. [276]

Q. About 11:00? A. Yes.

Q. And you do remember the time?

A. Yes.

Q. Can you remember any other parts of the conversation or anything else that took place in that conversation?

A. Well, it has been some time. I would not remember all the conversation because I did not feel it would be necessary to remember it.

Trial Examiner: Give us your best recollection. Your explanation is unnecessary. If you don't remember, just say so.

The Witness: I had introduced Mr. Lugoff to Doris Farley. We were talking and he asked me if I had any connection with the Guild, that there were rumors going around and he wanted to know if I knew anything about it. And I said "no."

And then he said he certainly hoped so because it would mean immediate dismissal for anyone who

(Testimony of Gloria Hickey.)

was connected with the Guild. That he had heard that it had started in the North Long Beach office and that somebody in the classified ad picked up the ball and he had heard there was a classified ad girl in the Bellflower office, or words to that effect.

Q. (By Mr. Kaufman): How long were you there talking to him? A. I don't know.

Q. Well, it was several minutes, wasn't it? [277]

A. Oh, yes.

Q. Now, can you give me anything else? You have virtually repeated the conversation elicited by General Counsel but do you have—well, you did have other conversations there, did you not? [278]

* * *

Q. At last I believe I understand. Now, in this conversation were you told by Mr. Lugoff that you were fired for union activities? A. No.

Q. Did he give you a reason for discharging you?

A. He said that Colonel Smith had ordered it because of an economy cutback.

Q. What was your answer to that, if any?

A. When he first gave me my checks, I said, "I am being discharged because I am wearing this button."

Q. What was his answer to that, if any, after he told you that Colonel Smith had fired you and others on an economy move?

Trial Examiner: Not what you told him before but——

The Witness: I told him I did not believe it, that, after all, I wasn't that stupid.

(Testimony of Gloria Hickey.)

Q. (By Mr. Kaufman): What did he say to that, if anything?

A. He said he was sorry he had to do it, that my work had [287] been satisfactory as far as he was concerned. There wasn't any personal feeling but he was sorry if I was mixed up in the Guild because that they would not be able to do anything for me.

I told him that I was under the impression that they could not fire you because of other Guild activities and he said he had a situation like that some fifteen years ago and he named the Hollywood News, and he said, nothing ever came of it. So he said, "They can't do anything for you." He was sorry I had got entangled with it.

Q. Go ahead, what else?

Trial Examiner: Was there anything else?

The Witness: No, not that I remember right now.

Q. (By Mr. Kaufman): And I take it that Mrs. Farley was present during this conversation?

A. I would say that Mrs. Farley could hear the conversation. This close I believe that anybody could hear it.

Q. She was present, is that correct?

A. Yes.

Q. And didn't you at one time on the witness stand say the three of you were together?

A. Yes, we were together.

Q. So there would be no question but that you were together?

(Testimony of Gloria Hickey.)

A. That is right and you could certainly overhear the conversation. [288]

Q. How close was Mrs. Farley standing to you?

A. Let us say approximately eight feet and establish it at that because I would say that that was about right. I don't know, however.

Trial Examiner: All right, you have answered it.

Q. (By Mr. Kaufman): Did you ever file a request with the Department of Employment of any kind? A. Yes, for unemployment insurance.

Q. Yes. A. Yes, I did.

Q. And in that request besides your name and address, they ask you the reasons why you left your last employer; is that correct? A. Yes.

Q. Did you fill in that line at all in your request? A. Yes, I did.

Q. And what reason did you give in filling in the line?

A. I gave the reason that Mr. Lugoff gave me—economy cutback.

Q. And how soon after you were fired, did you make such an application? [289]

* * *

The Witness: I think I may have something in my purse that can tell you the exact date I filed it.

Q. (By Mr. Kaufman): Well, perhaps I can refresh your memory without checking your purse.

A. I would say it had been approximately seven weeks.

Mr. Kaufman: I would like to offer into evi-

(Testimony of Gloria Hickey.)

dence, your Honor, the application of the witness for unemployment insurance as Respondent's—I imagine it would be Exhibit "A"?

Trial Examiner: It would be No. 1. It is your first exhibit.

* * *

Q. (By Mr. Kaufman): Now, was Miss Fitzgerald there that morning?

A. Miss Fitzgerald came in that morning while we were all [290] there. Now, whether or not she was there when he first came in, I don't recall.

Q. She was wearing a union button, was she not? A. Yes, I gave her mine.

Q. And she was wearing it?

A. And she put it on.

Mr. Grodsky: I was going to object to that as not placing the time.

Trial Examiner: Well, this will come.

Q. (By Mr. Kaufman): This had occurred after you talked on the 18th?

A. That is right.

Q. And it started at 11:00 o'clock on the 18th?

A. I didn't say that. I said on the morning of the 18th Mr. Lugoff came in at approximately 8:45.

Q. Was it the morning of the 17th about 11:00 that she was wearing a union button?

A. I don't recall on the morning of the 17th seeing her at all.

Q. Then did you see her on the 16th?

A. She was in and out of the office.

Q. When did you give her your button to wear?

(Testimony of Gloria Hickey.)

A. On the morning of the 18th.

Q. At what time about?

A. Let us say between 8:45 and 9:15. [291]

Q. And how long did you remain in the office after you got your pay checks?

A. Maybe thirty minutes.

Q. Was she wearing a union button during a substantial part of that thirty minutes?

A. I gave her my union button after I had received my checks, after Mrs. Farley had received her check also. Mrs. Farley, Mr. Lugoff, Dorothy Bush and Miss Fitzgerald and myself were there.

Q. Was she wearing it?

A. Yes, she put it on and was wearing it.

Q. Was it in plain view?

A. I would say yes. [292]

* * *

Redirect Examination

By Mr. Grodsky:

Q. Do you have a copy of the statement that you made to the Examiner of the Board?

A. I have a copy of it.

Q. Now, with reference to this unemployment insurance— [300] where is that exhibit?—application, you made application for unemployment insurance because you were not working; is that correct? A. That is true.

Q. Had you at any time since your lay-off been offered any job by the Herald American?

(Testimony of Gloria Hickey.)

A. I have not.

Q. When you went in to see the interviewer, did the interviewer ask you why you were discharged?

A. She did.

Q. What did you tell the interviewer?

A. I told her that they told me——

Mr. Kaufman: I am going to object to that as improper examination.

Trial Examiner: I think it is proper. I have heard this before and the witness may explain why she put that in.

Mr. Kaufman: May I pursue this just a moment?

Trial Examiner: Sure.

Mr. Kaufman: Is she entitled to enter into a conversation between herself and the interviewer? To me, this violates every rule that I know. Now, if there was a reason for it, but the evidence doesn't disclose it.

Trial Examiner: I am going to take the testimony. This question, as you may understand, comes up from time to time, this very point, the filling out of these forms and I [301] do not address myself to the weight to be given to it as yet. They are merely other admissions and admissible as such, but I have, for my part, consistently and for good reasons, taken in testimony which has led up to the filling out of the application. In other words, the subject has been opened. Go ahead.

Q. (By Mr. Grodsky): When the interviewer

(Testimony of Gloria Hickey.)

asked you the reason for your discharge, what did you tell her?

A. I told her they told me it was an economic cut back but that I felt fairly certain it was because I had joined the American Newspapers Guild as they had very strong feelings against the Guild.

Q. When you filled that out, were you given any instructions as to what reason to put in?

A. No.

Q. Is there any reason why you did not mention the possibility of the newspaper Guild as being the reason for your discharge?

A. I told that to the interviewer but the reason they had given me was economy cut back and I thought it fair to use what they had said.

* * *

Recross-Examination

By Mr. Kaufman:

Q. The interviewer did not tell you to put [302] the words "economy cutback" in there?

A. No.

Q. Do you know the name of the interviewer?

A. No, but I would recognize her.

Q. You mentioned the fact that you had made a statement to the investigating officer?

A. That is correct.

Q. And that statement was transcribed ultimately or was it written up that same day?

A. Yes.

(Testimony of Gloria Hickey.)

Q. Did you get a copy of it that same day?

A. Yes, I have a copy now.

Q. Did you get a copy the same day, that was what I asked?

A. Yes, I got a copy the same day.

Q. Did you also receive a copy of Mrs. Farley's statement? A. I did not.

Q. Do you have the copy of the statement that you received? A. Yes.

Q. Is the copy in your possession now?

A. Yes, it is.

Q. Did you read this statement in order to refresh your memory before taking the witness stand today? A. I did not read it today.

Q. When did you read it; yesterday?

A. I read it about three days ago. [303]

Q. How many times have you read it since you first received it? A. Once.

Q. I take it the once was when; three days ago?

A. No, I read it shortly after I got it.

Q. That is the first time?

A. To be sure it was correct.

Q. Did you find any errors? A. No.

Q. Then you read it again?

A. About three days ago.

Q. How long a statement is it?

A. About two pages.

Q. And you read it in order to refresh your memory before coming to this witness stand; would it be fair to say that? A. Yes.

(Testimony of Gloria Hickey.)

Q. And it did refresh your memory; would it be fair to say that?

A. Yes, it refreshed my memory somewhat.

Q. Now, may I examine the aid to memory—— [304]

* * *

RAYMOND J. ROSS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you state your name and address, please?

A. Raymond J. Ross, 13807 Bluegrove Avenue, Bellflower.

Q. Mr. Ross, in what position were you employed by Herald American?

A. As city editor of the Lakewood edition.

Q. When were you employed by the Herald American? A. On or about March 22, 1954.

Q. And during the period of your employment, did you have any discussion with any representative of management about the Guild? A. Yes.

Q. With whom did you have such discussion?

A. Mr. Butler.

Q. And when did that conversation take place?

A. At about 1:00 p.m. on July 12th.

(Testimony of Raymond J. Ross.)

Q. Of 1954? [308] A. Yes.

Q. Where did the conversation take place?

A. On the parking lot of the Lakewood Country Club, Los Angeles.

Q. Was there anyone else present but you and Mr. Butler? A. No one else was present.

Q. What did you say to him and what did he say to you?

A. He said, "I hope you haven't been sucked into this Guild, have you?" And I said, "Guild—what do you mean?" And he said something to the effect that it was a newspaper Guild.

Then he pulled a Guild membership application from his pocket and showed it to me and said, "One of my boys was approached with this and of course, he brought it to me right away and I just wondered if you had been connected with it."

And I said "No, I guess I am too new. I guess they do not trust me."

Q. What else was said, if anything, do you remember? A. He indicated——

Trial Examiner: Tell us what he said not what he indicated, to the best of your recollection.

The Witness: All right, I am sorry.

He said that he had always associated the newspaper Guild with the Leftist movement and especially since Phil Connelly had appeared in the picket line when the Huntington Park Signal had gone out on strike some years before. [309]

(Testimony of Raymond J. Ross.)

I asked him who Bill Connelly was and he said he had been an editor of the "People's World." I don't recall any other conversation regarding the matter at that particular time.

Q. Do you recall the date on which you were discharged? A. That was August 17, 1954.

Q. Now, who discharged you?

A. Warren Butler.

Q. Did he come to the Lakewood office?

A. Yes.

Q. What time did he get to the Lakewood office?

A. Approximately at 4:30.

Q. Will you describe what happened from the time that he came to the Lakewood office on that occasion?

A. At the time he came in, I was very busy finishing up my lead story of the week and writing a headline and he just stood by. The messenger was there and I wanted to get that batch of copy in as soon as possible, and about ten or fifteen minutes later, we walked outside and he told me that the company was having an economy drive and that I would be no longer on the payroll after tonight.

Q. Did you say anything then?

A. I said, "Of course, I know and you know that I am being discharged because I am wearing this Guild button," which I pointed to at that time, on my person. [310]

And he said that he was told that there was an

(Testimony of Raymond J. Ross.)

economy drive and that I could interpret that any way I wished.

Trial Examiner: I don't know whether the witness is finished or not. Are you finished with the conversation?

The Witness: I don't recall any other part of it at this time.

Q. (By Mr. Grodsky): Did you have any talk with any other representative of management about your layoff or discharge? A. Yes, I did.

Q. With whom did you talk?

A. To Colonel Smith.

Q. Was that in person or by telephone?

A. Telephone.

Mr. Kaufman: Would you speak up a little louder, please?

The Witness: All right.

Trial Examiner: Keep your voice up, would you, please?

Q. (By Mr. Grodsky): What was your conversation with Mr. Smith?

A. I asked Mr. Smith why I was being discharged and he said that it was because of an economy drive that he had insisted on a retrenchment three or four weeks earlier. And that some persons had been laid off, I believe he said three or four persons had been laid off, and he had further instructed on a retrenchment and that was why I was being laid off, as a result of that. [311]

And he thought it was only fair that I should be

(Testimony of Raymond J. Ross.)

let go first because, as far as he knew, I was the newest employee in that department.

Q. Was that all?

A. He also indicated that I would be rehired if business warranted it.

Q. Were you ever called back to work?

A. No.

Q. Returning to your conversation with Mr. Butler, Mr. Butler indicated as of when that you would be let go?

A. He said I would be off the payroll that night.

Q. Was there any discussion between you and him with reference to your work?

A. I don't understand the question.

Mr. Kaufman: These questions are slightly leading and suggestive. I am going to object.

Trial Examiner: I will overrule the objection. The witness has indicated, I think, that his memory was exhausted.

You may answer the question.

Mr. Grodsky: He did answer the question but he wasn't certain what my question referred to. It seems it was ambiguous to him.

Trial Examiner: All right, rephrase it.

Q. (By Mr. Grodsky): Is Tuesday normally a busy day or a light day for you? [312]

A. It is the busiest day in the week in the editorial department on this job.

Q. Normally when do you get through with your work on Tuesdays?

A. At that time I got through with my work

(Testimony of Raymond J. Ross.)

not on Tuesday but Wednesday morning at around from 2:00 to 4:00 a.m.

Q. Now at the time that you were speaking to Mr. Butler, you still had some unfinished work?

A. Quite a bit of it.

Q. Did the question of what would be done with that work come up in your discussion with him?

A. I asked Mr. Butler if I was to finish out the rest of the edition, which, of course, would carry me on to the next day, and he said that was something I should discuss with Colonel Smith.

Q. Did you discuss it with Colonel Smith?

A. Yes, I did.

Q. When did you discuss this with Colonel Smith?

A. At the time I called him. The same call I mentioned previously.

Q. And what was said with reference to this subject?

A. He indicated that I should discuss that with Mr. Butler. I told him I had already discussed it with Mr. Butler and had been referred to him. Then Colonel Smith left it up to me whether or not I would finish up that edition. I chose to [313] finish it.

Trial Examiner: And completed your work when?

The Witness: At about 5:00 a.m. Wednesday morning. However, I had some trouble with my car and did not arrive at the Compton office until

(Testimony of Raymond J. Ross.)

some time later that morning, around 7:30, I believe, I am not positive.

Trial Examiner: You did not have any trouble, if I understand you correctly, before you finished your work?

The Witness: That is correct.

Trial Examiner: Before we get away from the subject, what was your weekly salary at the time of your discharge?

The Witness: At that time I was drawing $75.00 per week plus $10.00 car allowance.

Trial Examiner: Whether or not you used the car?

The Witness: It was a flat rate. We did not have to account for it in our expenses.

Trial Examiner: All right. Go ahead.

Q. (By Mr. Grodsky): Mr. Ross, prior to the time of your discharge, was there any usual or normal time when you would get through with your work on Tuesday evening?

Trial Examiner: Hasn't he answered that?

Mr. Grodsky: I don't believe so—wait a minute—did he answer that, counsel?

Trial Examiner: Well, I have heard no objection, but it will not take any more time, that is granted. You may answer. [314]

The Witness: The Tuesday work usually carried on until some time between 2:00 and 4:00 o'clock on Wednesday morning.

Q. (By Mr. Grodsky): When you were through with that Tuesday work, did you have any cus-

(Testimony of Raymond J. Ross.)

tomary practice; what did you do with your material when it was completed?

A. I usually carried my material to the Compton office as there was no messenger service at that time.

Q. And you would take it to the Compton office immediately after completing it? A. Yes.

Q. Do you remember what you were wearing on the date of your discharge?

A. I recall the shirt I was wearing but not the trousers.

Q. Where was the Guild button affixed?

A. On the upper portion of the pocket on the left-hand side of my shirt.

Q. There was nothing hiding it?

A. No, it was a sports shirt and I had no jacket.

Q. What color was the sports shirt?

A. It was a light buff color.

Q. I show you General Counsel's Exhibit No. 9 and ask you if this is the kind of union button you were wearing on that day?

A. It appears to be of the same design and construction.

Q. (By Trial Examiner): Had you ever worn it at work [315] before? A. I did not.

Q. Was this the first day you had began to wear it? A. Yes, it was.

Q. When, during that day, did you put the button on?

A. Before I left home and I arrived at the office

(Testimony of Raymond J. Ross.)

at approximately 10:30 that morning. I didn't take it off at any time during the day.

Q. Can you tell me for what period of time or what periods of time Mr. Butler was in the office that day, to your knowledge and observation?

A. To my knowledge and observation, Mr. Butler wasn't in the Lakewood office at any time until approximately 4:30 that afternoon.

Mr. Grodsky: No further questions.

Cross-Examination

By Mr. Kaufman:

Q. Mr. Ross, at 4:30 in the afternoon, you say Mr. Butler arrived. Well, what time did you have this conversation, this first conversation with him?

A. Ten or fifteen minutes after his arrival.

Q. Were there any customers at the counter at that time? A. I don't recall that.

Q. There could have been; is that correct?

A. Yes.

Q. Did you have a termination check of any kind? In other [316] words, you, yourself, decided to work on, on the Tuesday and quit on Wednesday? A. Yes.

Q. How long were you paid for?

A. I was paid for the complete week and one week following. I was paid through August 28th.

Q. And when did you get your check?

A. It was the following Friday or Saturday. I don't recall at this time.

(Testimony of Raymond J. Ross.)

Q. When you talked to Colonel Smith and asked him about being discharged and so forth, he told you that you were a very new editorial man?

A. He did not so state.

Q. Well, I misunderstood your testimony. I thought he said you were one of the newest employees in the department?

A. He said as far as he knew, I was the newest employee in the department.

Q. Did you answer that? A. I did not.

Q. Was it true? [317]

* * *

The Witness: I believe there were two persons younger in that employment.

Q. (By Mr. Kaufman): You, at least, did not call that to Mr. Smith's attention? A. No.

Q. Now, he did say that if business picked up, you would be rehired; is that right?

A. Those may not be his exact words. He said something that led me to believe that.

Q. He did not question you about any activities, did he? A. He did not.

Q. He did not say you were being discharged because of any union activities?

A. He did not. [318]

* * *

Q. However, it probably deserves the same answer as it got. Now, he and you were walking back I take it and as I understand [320] it, to your respective automobiles together, to go on your re-

(Testimony of Raymond J. Ross.)

spective ways? A. That is right.

Q. And this is the time the alleged conversation took place? A. That is correct.

Q. And there were the two of you, Mr. Butler and yourself? A. That is right.

Q. Now, at what time of the day would you say that this happened?

A. At 1:00 p.m. approximately.

Q. At that time were you a member of any Guild or Union?

Mr. Grodsky: I object.

Trial Examiner: Well, this goes to the witness' interests.

Mr. Grodsky: May I point out that the witness is interested from the fact that there is an 8(a)(3).

Trial Examiner: I will permit the question. You may answer, sir. Or, do you want the question read?

The Witness: My answer to this would be I don't know.

Q. (By Mr. Kaufman): Well, would you explain that further as to why you don't know?

A. I had, previous to that time, applied for Guild membership but I had not, at that time, received any acceptance.

Q. When had you originally applied?

Mr. Grodsky: Now, I will object. Certainly this would not have any bearing on the matter at all. [321]

Trial Examiner: Well, it also has another aspect.

(Testimony of Raymond J. Ross.)

I will permit some degree of interrogation on this. I will permit this question.

Q. (By Mr. Kaufman): When had you applied, sir?

A. I have difficulty in recalling the approximate time, but it must have been near the end of April or the first part of May.

Trial Examiner: Of this year?

The Witness: Yes.

Q. (By Mr. Kaufman): You commenced work, I believe, on March 22nd? A. Yes.

Q. And it was shortly thereafter, any way, in point of time? A. That is correct. [322]

* * *

Mr. Kaufman: Right. It is stipulated that the Herald Publishing Company purchased from a Glendale, California, broker, three comic cartoons to use as filler material, when and if there was a need in its papers.

The broker from Glendale, California, ordered for the Herald Publishing Company from Harry Cook Syndicate, New York City, New York; Chicago Sun Times, Chicago, Illinois, and the McNaught Syndicate, New York, New York.

These were used not regularly or in sequence by the Herald Publishing Company. The issues of October 14th, 1954, and December 2nd are typical of the use of these fillers.

* * *

Mr. Kaufman: Nine issues representing the nine different areas covered by the Herald American were examined, bearing the dates December 2nd and October 14, respectively. The examination revealed that in the October 14th issue of the Herald American, there appeared in the Downey-Riviera issue, one [331] cartoon on page 19 of said paper, being a Field Enterprise, Inc., cartoon, entitled "Angel," in size about 4 inches by 4 inches. This newspaper contains not less than thirty-six pages.

There appears in the Paramount-Hollydale issue of October 14, 1954, on page 6 of said paper, two additional cartoons entitled "Angel," each 4 inches by 4 inches, this issue being approximately the same size as the Downey-Riviera issue.

An examination of the other seven newspapers, to wit, Lakewood Herald American, Los Altos Herald American, Bellflower-Artesia Herald American, Norwalk Herald American, North Long Beach Herald American, Lynwood Herald American and Compton Herald American, all papers printed the same day of approximately the same number of pages, revealed no cartoons whatsoever.

An examination of the same papers, to wit, the nine issues bearing the date of Thursday, December 2nd, showed the Norwalk Herald American as having two cartoons also entitled "Angel," the same size as heretofore mentioned.

The other eight papers heretofore enumerated had no cartoons whatsoever.

It is further stipulated that these cartoons entitled "Angel" started on August 25th, 1954, and

that they are not in continuity, regularity nor used in each edition of the same newspaper, to wit, where nine editions of the newspaper were mentioned herein, they would not appear in all nine. [332]

It is further stipulated that they were discontinued as of December 8, 1954.

It is to be noted that by this stipulation, we are covering, amongst other things, the fact that the number and times and sizes of cartoons are representative of and typical for all issues published during the period from August 25 to December 8, 1954, inclusive.

It is further stipulated that cartoons furnished by these three syndicates have been used occasionally, but at no frequency or of a greater size of extent than "Angel," during the period August 25 to December 8, 1954, inclusive, when such service was terminated.

* * *

Trial Examiner: On the record.

Gentlemen, the stipulation is read into the record. Is that your stipulation?

Mr. Grodsky: I am prepared to stipulate to those facts.

Mr. Kaufman: All right.

Trial Examiner: All right, Mr. Kaufman has signified his assent, too. [333]

* * *

RALPH J. BREWER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you state your name and address, please?

A. Ralph J. Brewer, 5105 Escalon Avenue, Los Angeles 43.

Q. What is your position—what was your position, Mr. Brewer, during the months of July and August with the Herald American?

A. General manager.

Trial Examiner: Are you referring to 1954, Mr. Grodsky? You are, aren't you?

Mr. Grodsky: Yes, 1954. [334]

* * *

Q. (By Mr. Grodsky): Mr. Brewer, how long have you been employed at the Herald American Publishing Company?

A. Since January 10, 1937.

Q. When you came, sir, in what capacity did you come there?

A. I had six caps on the wall. I held everything from a janitor's job to the top job, or, rather, to manager.

Q. I don't suppose you held that janitor job for very long? A. For a couple of years.

Q. What was your next job after that?

(Testimony of Ralph J. Brewer.)

A. I was manager and went to the title of general manager in 1945, I believe.

Q. As general manager, what are your duties at this time?

A. I am not general manager at this time.

Q. Excuse me, in July and August of this year, when you were general manager, what were your duties?

A. I had complete charge of the entire operation, being under the supervision of Colonel Smith.

Q. And did you have charge of advertising?

A. Indirectly.

Q. Were you ever directly in charge of [337] advertising? A. Many years ago.

Q. How many years ago?

A. Previous to 1945, I would say.

Q. What title did you have at that time?

A. Manager.

Q. Has the nature of the operation changed since that time?

A. It has grown considerably since that time.

Q. Aside from an increase in size, has there been any change in the kind of newspaper you are putting out since that time?

A. No, the newspaper has stayed the same type of newspaper but we have put on additional editions.

Q. Has the kind or quality of advertising changed in any way?

A. No, except more of it.

Q. Now, Mr. Brewer, in your operation, do you

(Testimony of Ralph J. Brewer.)

have a kind of advertising described as "national advertising"? Did you have any which you would describe as "national advertising"?

Mr. Kaufman: To which I am going to object as calling for a conclusion of the witness and also it is irrelevant, immaterial and incompetent and not within the issues of the case.

Trial Examiner: You are referring, I take it, that in the course of his duties that he would describe any advertising as "national advertising" in connection therewith. I will overrule the objection.

The Witness: Can I have the question again, please? [338]

Mr. Grodsky: Would you read the question?

(Question read.)

The Witness: In my opinion, no.

Q. (By Mr. Grodsky): Well, I didn't ask for your opinion. I asked it in language of your newspapers or in the language of department, do you have something that is called "national advertising"?

Mr. Kaufman: I submit that the question has been asked and answered.

Trial Examiner: I don't think so. I will overrule the objection. Do you give us your opinion. I purposely asked counsel to explain his question on the assumption that you were listening to the examination, so that it will make it clear whether or not in the course of your duties and in connection

(Testimony of Ralph J. Brewer.)

with the operation of the newspaper, you had such a thing as national advertising.

The Witness: The answer would be yes.

Q. (By Mr. Grodsky): And in the course of your duties and in the course of your operation, what was encompassed within the meaning of that term, "national advertising"?

Mr. Kaufman: To which I am going to object as irrelevant, immaterial and incompetent, and not within the issues of the case. Whatever his term of "national advertising" might be, doesn't throw any light on what the Board is going to consider "national advertising." [339]

Trial Examiner: I would say that I am going to take testimony. I am going to take testimony if for no other reason than it has already been injected into the case and is intended to describe a kind of advertising they had and possibly might have been a method of defining or advertising a particular type of advertisement.

The point I made before was that in calling something "national advertising" doesn't make it national advertising and I still adhere to that view.

As I say, if for no other reason than for purposes of identifying a certain type of advertising in the course of this respondent's business, I am going to receive the testimony. The objection is overruled.

The Witness: Read the question again, please.

Trial Examiner: Yes, read the question again.

The Witness: Advertising from local agencies or from advertising agencies.

(Testimony of Ralph J. Brewer.)

Q. (By Trial Examiner): May I ask what you have reference to, what kind of local agencies?

A. Any type of copy received from an advertising agency within the Los Angeles or San Francisco or Compton and so forth.

Q. Do I understand when you use the term "local agency," that you mean "local advertising agency"? A. That is right. [340]

Q. (By Mr. Grodsky): Then I am clear in my understanding that "national advertising" meant the advertising that came to your company from advertising agencies? A. That is right.

Q. And it only meant that?

A. That is right.

Q. Do your papers still carry that kind of advertising? A. That is right.

Q. And do you still get that advertising from the agencies? A. That is right.

Q. And do you still refer to that as "national advertising"? A. That is right.

Q. You also get advertising placed by local merchants? A. That is right.

Q. And sometimes a local merchant will place an advertisement just entirely devoted to advertising, a single nationally known product?

A. I would not say that, no.

Q. Showing you General Counsel's Exhibit No. 2 for identification, and I show you this advertisement of Lee's Department Store, which has previously been described, in connection with the testimony of Mr. Hartwell, this advertisement is en-

(Testimony of Ralph J. Brewer.)

tirely devoted to advertising an item called "Playtex Living Bra"? A. Yes. [341]

Q. And the advertisement is placed by Lee's Department Store? A. Yes.

Q. Was this advertisement placed by an advertising agency?

A. Not to my knowledge. Lee's place their own advertising. We have an account with them.

Q. Would you construe that as "national advertising" in your operation?

A. Absolutely not.

Q. Now, you have from time to time, advertisements by local dealers who sell Fords and Chevrolets and other makes of automobiles?

A. That is right.

Q. And those advertisements are placed by the local dealers; is that correct? A. Yes.

Q. And you consider that in your operation as "local advertising"? A. Yes.

Q. Not "national advertising"? A. No.

Q. Now, in connection with that advertising—I am now referring to advertisements by automobile companies—you are aware of the fact that most of the time they use a mat which comes from an advertising agency, or are you? A. No. [342]

Q. Do they sometimes use mats which come from advertising agencies?

A. The dealers themselves authorize the ads, they O.K. the ads. It is their money. They pay for the ads. They may come from an agency, so we consider that as local advertising, regardless of whether

(Testimony of Ralph J. Brewer.)

we know or don't know where the mats come from.

Q. I am asking you if you know whether, in fact, the mats come from advertising agencies?

A. No.

Q. You don't know? A. No.

Q. Have any of the mats that have come to your company, come directly from advertising agencies?

A. Yes.

Q. Then you do know in some cases, the mats do come from advertising agencies?

A. Yes, I would say that some of them may.

Q. You say some of them may; do you know for a fact that some of them do?

A. Well, say some of them do.

Q. Fine. Now, why do the agencies send you the ads, if you know?

A. They are only sent to us upon authorization of the local dealer. [343]

Q. Is it your testimony, Mr. Brewer, that those mats are sent to you after you have made a sale?

A. A contract may have been made with a local dealer with the observation that we may get the mats next winter but it still comes from an order of the local dealer.

Q. Now I am asking you if there is another kind of operation by which the advertising agencies send the mats before you have any kind of a contract for the placement of those particular mats in the paper? A. No.

Q. To your knowledge, have there ever been cases in which you have received mats and after

(Testimony of Ralph J. Brewer.)

receiving the mats sent the display salesman to solicit advertisements with the representation that you have a mat for a good display, or a good advertisement?

A. You are talking about automobile dealers now?

Q. Yes. A. No.

Q. Have you done it with reference to other commodities? A. No, not to my knowledge.

Q. Do you know from your knowledge as to whether some advertising agencies make it a practice to send the mats to your office with a view for your solicitation of the business?

A. It isn't a general practice, no.

Q. Now, can you give us an estimate, if you can, of how [344] frequently or how many advertisements you have placed for local dealers in which the mats have come to you from advertising agencies? A. I have no idea.

Q. Do you know whether these advertising agencies are agencies for the local dealer or are they agencies of the manufacturer?

A. Some would perhaps be for the manufacturer and some may be for the local dealers' association.

Trial Examiner: Well, let us get down to specifics. What was the last occasion when your newspapers received any advertising of an automobile from an advertising agency?

The Witness: We do, every week.

Trial Examiner: Now, specifically, what makes of cars are involved?

(Testimony of Ralph J. Brewer.)

The Witness: We have practically every make of popular cars of the dealers in California, I mean in Compton and with the new models being announced just now, they are spending a lot of money. And we have been very heavy recently in that type of advertisement. Could I explain my thought on this automotive advertising?

Trial Examiner: In a moment perhaps. I want you to keep your thought here and I will be very happy to get any relevant information later on.

Dealing with the season, is it a case that there is a [345] period of the year when the concentration of the advertisement of automobiles is the heaviest in the issuance of new models?

A. That is right.

Q. Does this advertisement come from agencies?

A. Your definition of advertising and mine is at variance.

Q. The copy?

A. The copy comes from an agency.

Q. Now, we will take up both features to try to get the picture. Have you occasions when you get both the copy and the placement of the advertisement from agencies in relationship to these automobile models?

A. Only in all cases where it has to be O.K.'d by the local dealer.

Q. You have such cases, but in each case the placement of the advertisement has to be O.K.'d by the local dealer?

A. Yes, by the local dealer.

(Testimony of Ralph J. Brewer.)

Q. Now, taking a season in the year when the new models come out, and I don't care whether you take this season or last season, whichever will be easier for you, can you tell me whether or not it is customary or standard practice to get both the advertisement and the copy from the advertising agency rather than from the dealer, or to get it from the dealer rather than from the advertising agency, realizing, of course, that when you get it from the advertising agency, you [346] have still to get the O.K. from the local dealer?

A. Most of the copy is sent direct, either from the electroplating company, which isn't an agency or from the agency to the paper, with instructions that it must be O.K.'d by the local dealer, because it is their money they are spending and it must be O.K.'d by him before the order is valid.

Q. Who places the order for advertising, bearing in mind that it needs the dealer's approval?

A. An agency.

Q. An advertising agency? A. Yes.

Q. Will you give me the names of advertising agencies that place this automobile copy?

A. I cannot tell you. I don't come in contact with these names, your Honor.

Q. Let us take last season of the year, the names of the agencies?

A. I have not been in this type of advertising since 1945. I could give you one name if you wanted an example of one account.

(Testimony of Ralph J. Brewer.)

Q. I would like to have whatever information you have.

A. Batton, Barton, Durston & Osborne.

Q. Do you know where their office is?

A. They have one in Los Angeles and one in Hollywood.

Q. Do you know whether they have an office, either their main [347] office or otherwise, in New York City?

A. I could not say. We deal only with the Los Angeles office.

Q. Now, what are the makes of cars for which that concern places advertisements?

A. Packard.

Q. The Packard Motor Company?

A. Yes.

Q. Now, I promised you an opportunity to make some explanation you wanted to give me before. I don't know whether it is relevant or competent. If it isn't I will strike it, but I am going to receive it.

A. O.K. On the term of "national advertising," in relation to Mr. Hartwell's testimony, I would like to give exactly what we or myself calls "national advertising" as such, in our office.

Q. Have you not done so? A. No.

Q. All right, go ahead.

A. I will give you a short illustration.

Q. Go ahead, sir.

A. Well, Dan B. Minor——

Q. Who, sir?

A. Dan B. Minor, an advertising agency in Los

(Testimony of Ralph J. Brewer.)

Angeles handles the Lakewood Plaza Sub-division, that is, Lakewood Plaza Sub-division located in the area we serve. They also handle Weber [348] Bread, which is a local product.

Now, both of those are strictly local. They have nothing at all outside of the state on those two items. Yet we call them, although Mr. Hartwell's definition is national advertising manager, who handles those particular accounts, local accounts.

We have another firm here who handles—Stiller and Associates—they handle real estate tracts which we carry. We have, I believe, the Heintz Company who carries Bekins. It isn't long distance, it is local advertising. We have the Glasser Agency, which handles the Ralph Markets, which is strictly a Compton and Los Angeles market only.

Q. Do you refer to these as "national advertising"?

A. They are advertising agencies and Mr. Hartwell, as national advertising manager, handles these particular agencies and is titled national advertising manager, but his title of national advertising manager doesn't indicate that he is handling nothing but all nation-wide advertising accounts.

Q. But my point is, what do you call "national advertising"?

A. That is what I am saying, we call all of that national advertising.

Q. Let me ask you this preparatory question and perhaps we will be clear. Do you ever receive any advertisements for automobiles direct from the

(Testimony of Ralph J. Brewer.)

dealer, rather than from an advertising [349] agency? A. Yes.

Q. And have such advertisements included the popular makes of cars to which you have previously averred?

A. There are two or three of them that handles our advertising.

Q. And do I understand that that doesn't come from an advertising agency, therefore, you do not call it "national advertising"?

A. Yes, the local salesman handles that account.

Q. That isn't my question as to who handles the account. My question goes to the label, if any, that you folks supply to the advertising, whether you call that kind of advertising "national advertising"?

A. We don't break it down that way. The local salesman handles the account. On the agency deal account, it is local advertising or otherwise, and as long as it comes through an agency Mr. Hartwell handles it and it is "national."

We do not carry the account of "Playtex" through any agency or through any national account. We have nothing to do with the national account on it. It is handled at the local level, so that is local business.

Q. Now, do you know, of your knowledge, in the course of discussions with these firms, such as Lee's, whether or not the funds are supplied for such advertisement by the retailer who places the

(Testimony of Ralph J. Brewer.)

advertisement or whether the funds are [350] supplied for such advertisement by the manufacturer?

A. As far as we are concerned, the funds are supplied by Lee's as we bill them and they pay it.

Q. I take it you don't know?

A. We don't know.

Q. I think I understand what you have been getting at and we will cover that point. I will put a question to you which will help you, I think, to finish your explanation.

Why do you call what you have referred to as "national advertising" by that name, if you know that is why the company calls it by that name?

A. Handling of advertisements by agencies isn't all over the City of Los Angeles or San Francisco or various places, but there is a lot of detail work that is required on it and it is better to have one man handling it than trying to have nine, ten or eleven men in the various editions trying to handle the same thing.

I will give you another illustration if I may as to the point of local origin of automobile advertising.

Q. No, excuse me a minute, I don't know if you are getting at what I have in mind. You call something "national advertising." What I am trying to get at is this: Why do you call it "national advertising" as distinguished from advertising agency advertising or "X" advertising?

A. We call it that because it has been a trademark name. [351] We have done it ever since we

(Testimony of Ralph J. Brewer.)

have been there. As far as Mr. Hartwell having a title of "national advertising manager," it was, more or less, given to him for the years of service rather than for any work he does in any particular way, except just handling the details that come along.

Q. How about the kind of advertising?

A. We lump it all under that particular head, as long as it comes through an advertising agency, it is called "national advertising."

Q. Do you know whether the custom of reference to it as that in your company arose because these agencies handle products which are distributed on a nation-wide scale, as, for example, the Ford Motor?

A. We follow no such trend. Instead of that, because we had to have a man to handle that particular thing we gave him the title of "national advertising manager." All newspapers you will find have a classified advertising manager, a display advertising manager, and some of them for automotive editorials—we do not have that—promotional manager.

It is nothing more or less than a phrase that is used in all newspapers, big or little.

Q. And you borrow it?

A. Yes, we borrow it.

Q. Have you been associated with other newspapers?

A. Previously to my seventeen years at the Herald American. [352]

(Testimony of Ralph J. Brewer.)

Q. Well, can you tell me from your knowledge and experience and your duties as you have described them, and your connection with newspaper publishing—I am asking for an opinion now of what I would call an expert—what the terms of "national advertising" denote in the newspaper publishing business?

A. Well, that is a little difficult to explain because of the different types of conditions in different newspapers. I will take the "Los Angeles Times," if you want me to, but we are certainly not in their department.

Q. In any case, they are not in your department. Go ahead.

A. They have an entire department which is set up for nothing but promotion. They spend hundreds of thousands of dollars cultivating the manufacturers and various buyers of various agencies all over the country.

That is set up strictly as an advertising promotional agency for business located out of town. You can call it "national advertising."

They will spend just as much money, however, to get an account in San Francisco as they will for one in Detroit, Michigan, or in New York City. It is all according to how much money that particular account has to spend.

I will give you an illustration of United Steel. Fabulous sums of money have been spent by the newspaper giants to get a large United Steel advertising schedule. They have spent [353] all of

(Testimony of Ralph J. Brewer.)

their money in T.V., radio and so on. We do not pretend to have any such department. That is what is recognized as "national advertising."

In a small area or community of the type that we operate within the County of Los Angeles, we are overshadowed by all your newspaper giants.

Q. In circulation?

A. As a daily paper against a weekly distribution paper. We have no chance to get that, so we have no "national advertising" as such. We never have had. We spend no money on it.

Mr. Hartwell handles eight or ten big accounts for us. If he did not, we could never pay him under the title of "national advertising manager."

Trial Examiner: I think I have the picture and I am more than ever persuaded that it is what the advertising is that counts rather than the label. I have taken some time with this witness and have given him an opportunity to explain his business rather fully in the interests of all concerned. [354]

* * *

Q. Now, Mr. Brewer, your company is a member of the California National Publishers' Association?

A. No, the California Newspapers Publishers' Association is, I think, what you mean.

Trial Examiner: Will you keep your voice up, please, Mr. Brewer.

The Witness: Yes, California Newspapers Publishers' Association.

Q. (By Mr. Grodsky): Now, as part of the as-

(Testimony of Ralph J. Brewer.)

sociation develops, do you know whether they try to get national advertising for their members?

A. I don't belong to that group.

Trial Examiner: Do I understand your answer is——

The Witness: I don't know. I do not belong to any national advertising organization or the C.N.P.A.

* * *

Q. Your company doesn't receive any revenues from the [363] C.N.P.A. with reference to advertisements under their national advertising program?

A. That is right. If you will let me say, not to my knowledge. I don't know of any. [364]

* * *

SOL LONDON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodsky:

Q. Will you state your name and address, please?

A. Sol London, 1601 West Eighty-first Street, Los Angeles 47, California.

Q. When did you go to work for the Herald American? A. In July of 1950.

Q. And in what capacity?

A. As a reporter.

(Testimony of Sol London.)

Q. Where were you working?

A. At the Compton office.

Q. What was your rate of pay at the time?

A. $50.00 a week plus $10.00 car allowance.

Q. At the time of your discharge, where were you employed ?

A. At the North Long Beach office of the Herald American.

Q. How long had you worked at the North Long Beach office? A. Approximately one year.

Q. Do you recall when you were transferred to the North Long Beach office? [376]

A. July of 1953.

Q. What was your rate of pay at the time of your discharge?

A. $75.00 a week plus the $10.00 car allowance.

Q. When had you received your last wage increase? A. I believe it was in March.

Q. Of 1954? A. Yes.

Q. And how much was that increase?

A. A $5.00 increase.

Q. When did you become active in union organization?

A. Oh, I believe it was the latter part of April or the first part of May, 1954.

Q. And did you ever discuss the matter of the Guild with any representative of management?

A. Well, I did with Mr. Cleland.

Q. Oh, well, Mr. Cleland, I am afraid—well, let me go into that. When you were working at the Compton office, what was your position?

(Testimony of Sol London.)

A. I was a reporter.

Q. And from whom did you receive assignments? A. From Mr. Cleland and Mr. Butler.

Mr. Kaufman: Now, just a minute. I think we are going to waste a lot of time in this hearing if we are going to go into Mr. Cleland and make him a supervisory officer. I think the record clearly indicates that he isn't and I am merely [377] stating this to expedite the hearing. If we are going to have a hassle it is going to take some time.

Mr. Grodsky: I am prepared to take some time.

Trial Examiner: Well, so far there has been nothing established, but the General Counsel has a right to produce some evidence concerning it and so have you.

Mr. Kaufman: All right.

Q. (By Mr. Grodsky): When you first came to work, who employed you? A. Mr. Butler.

Q. And did he introduce you to Mr. Cleland?

A. Yes.

Q. When he did, what, if anything, did he tell you about Mr. Cleland's duties with reference to you?

A. He introduced me to Jack Cleland and he told me that I would be working under Mr. Cleland and he told Mr. Cleland to assign me to some stories for the coming issue that week.

Q. While you were working at the Compton office, did you have occasion to observe whether there were other reporters working in the Compton office? A. Yes.

(Testimony of Sol London.)

Q. Do you know whether or not they received assignments of stories from Mr. Cleland?

A. Yes, sir.

Q. Did they? [378]

A. Yes.

Q. In the absence of Mr. Butler, who was in charge of the operations, so far as the editorial department was concerned?

A. Mr. Cleland was.

Trial Examiner: Well,what did he do that he did no do when Mr. Butler was there? You say he was in charge. What did he do when Mr. Butler wasn't there, that is, Mr. Cleland?

The Witness: Mr. Cleland gave assignments.

Trial Examiner: Excuse me a minute. You just said that when Mr. Butler wasn't there or was away, Mr. Cleland was in charge. Now this "being in charge" doesn't mean anything to me.

What did he do when Mr. Butler wasn't there? That is what I would like to know.

The Witness: He was responsible for both the Compton and the Lynwood editions on the editorial side. He took over the assignment of the work. I believe Mr. Cleland would have done that if Mr. Butler had been there.

If there were any questions about a story and whether we should handle it, Mr. Cleland would make that decision and he would make that decision if Mr. Butler wasn't there.

Trial Examiner: Well, what was the last such

(Testimony of Sol London.)

decision that you observed yourself that was made?

The Witness: I do not recall offhand. I was transferred out of Compton in July of 1953, and if Mr. Butler wasn't in [379] Los Angeles, Mr. Butler would tell me or Mr. Cleland would tell me to cover one of Mr. Butler's assignments which would be the City or Building reports.

Trial Examiner: As I understand your testimony, whether or not Mr. Butler was there, Mr. Cleland would give you assignments?

The Witness: Yes, both Mr. Butler and Mr. Cleland would give me assignments.

Trial Examiner: Well, what difference did it make whether Mr. Butler was there?

The Witness: Well, Mr. Cleland would have the sole editorial responsibility for the direction of the news stories and the handling of the stories.

Trial Examiner: Well, go ahead, Mr. Grodsky. I will tell you right now whatever terms I am getting under generalizations about Mr. Cleleand, such as "he was responsible for," and "being in charge," are entitled only to a certain amount of weight, if any.

Mr. Grodsky: I realize that.

Q. (By Mr. Grodsky): When did you have this discussion with Mr. Cleland you had reference to earlier?

A. A week before I was discharged, about 10th July.

Q. Do you recall what day of the week it was?

A. Saturday.

(Testimony of Sol London.)

Q. And where did the conversation take [380] place?

A. Well, I had fininished making-up on Saturday at the North Long Beach office, the edition and I asked Mr. Cleland——

Mr. Kaufman: Now, just a minute. The question was, "where did the conversation take place?"

Q. (By Mr. Grodsky): Tell us where it took place?

A. In a coffee shop next the Herald American.

Q. In Compton? A. Yes, sir.

Q. Who was present?

A. Just Mr. Cleland and myself. [381]

* * *

Q. (By Mr. Grodsky): Just to refresh your recollection, you testified about you and Mr. Cleland being in the coffee shop? A. Yes.

Q. On Saturday? A. Yes.

Q. Now, will you tell us what you said to him and what he said to you?

A. Well, we ordered coffee, of course, and we started talking in generalities and the subject got around to the Guild and Mr. Cleland mentioned that there had been a Guild drive going on and I expressed surprise at that time.

Mr. Kaufman: May I have some foundation facts on this conversation as to time? I do not believe I got it.

Q. (By Mr. Grodsky): Now, when did this conversation take place?

(Testimony of Sol London.)

A. I believe it was before noon on Saturday, July 10th.

Mr. Kaufman: Miss Reporter, would you please read the record about this conversation?

(Record read.)

Trial Examiner: Now, proceed with the conversation.

The Witness: Oh, Mr. Cleland asked me if I knew anything about it and I asked Mr. Cleland if he knew anything about and he said, "No," that Maxine Galt who worked in the office had brought in a copy of the "Guildsman" which [3991] stated——

Trial Examiner: Do not tell us what the newspaper stated, unless Mr. Cleland said what it stated.

The Witness: Well, he did. He said that the paper said an organizing drive was going on at the Herald American and I asked Mr. Cleland if he were going to join the Guild and he said, "Well, I will if everyone else does." And I told Mr. Cleland finally that I was as active in organizing a Guild unit and asked him if he would join.

Mr. Cleland seemed to be taken by surprise. He said, "I never thought that you would be in it," and I told him that a number of us in the Herald American believed that a Guild was needed in order to raise the wages and make for better working conditions, and we believed that a Guild had been needed for some time.

I gave Mr. Cleland a Guild application card and

(Testimony of Sol London.)

Mr. Cleland said he would think about it and let me know a few days later. He also mentioned regarding my participation in the Guild drive. He said, "I hate to see you crucified, Sol."

We returned then to the Herald American office and I continued on my way to my car and went home and Mr. Cleland went into the office.

Q. (By Mr. Grodsky): Did you have any further discussion with Mr. Cleland?

A. Yes, sir.

Q. When was your next discussion with [392] him?

A. It was on the Wednesday following that Saturday.

Q. What time did this occur?

A. In the morning.

Q. Do you have any better recollection?

A. Yes, very early in the morning.

Q. At what time would you say?

A. Oh, maybe about 9:30, I believe.

Q. Where did this conversation take place?

A. In the Compton office.

Q. In the office?

A. Yes, and I asked Mr. Cleland, well, if he had decided to join the Guild yet and he said, "no," that he had thought over it and well, he had talked to somebody at the Huntington Park Signal and Mr. Cleland said he did not think he would be eligible because he was a part of management.

I asked Mr. Cleland for the return of the Guild

(Testimony of Sol London.)

card and he said that he did not have it and the subject was closed then.

Q. Who notified you of your discharge when you were discharged? A. Mr. Butler.

Q. When?

A. It was on Saturday morning, July 17th.

Q. At what time of the day?

A. About 11:30. [393]

Q. Where did this take place?

A. It took place, oh, perhaps a quarter of a block from the Herald American office, near the Everglades Restaurant parking lot.

Q. How did you happen to be there?

A. Mr. Butler came into the back shop and he said he would like to speak to me before I left and when I had completed my make-up I went over to Mr. Butler in the office and said, "You wanted to speak to me?" And he said, "Yes." And we went over near the Everglades Restaurant parking lot.

Q. Was anyone else present at this conversation?

A. No, sir.

Q. Will you tell us the entire conversation?

A. Mr. Butler took out a check and handed me the check and said, "Sol, as of this moment you are discharged."

Q. And what did you say, if anything?

A. Well, I asked for an explanation. I told him I did not think it was right that I should be discharged without notice or explanation. Well, Mr. Butler said, "I cannot tell you why." And when I finally pressed him for an explanation, he said, "All

(Testimony of Sol London.)

I can say is that you thought more about other things than you did of the paper."

I told him I wasn't satisfied with that and he said, "If you want anything else, you will have to see the old man" and I said I would and I left. [394]

Q. When you left what did you do?

A. I went over to my car and started it up and I saw Mr. Oney Fleener walking towards the office. I stopped the car and he came over to the car and I told him——

Mr. Kaufman: Just a moment.

Trial Examiner: Do not tell us what you understood.

Mr. Grodsky: Mr. Examiner, I submit in view of Mr. Fleener's testimony here and in view of Mr. Butler's testimony concerning Mr. Fleener, that this is admissible because it links up with the other two conversations.

Trial Examiner: I don't understand that.

Mr. Grodsky: It just makes for a complete, a more complete story.

Trial Examiner: Well, a lot of things make for a more complete story, but we have certain evidential rules. I am not going to permit the conversation with Mr. Fleener.

Q. (By Mr. Grodsky): How long were you talking to Mr. Fleener?

A. Four or five minutes.

Q. What did you do then?

A. Mr. Fleener left.

Q. What did you do? A. I drove off.

(Testimony of Sol London.)

Q. Where did you drive to? Did you drive directly to Mr. Smith's house? [395] A. Yes.

Q. And when you got to Mr. Smith's house, did you have a conversation with Mr. Smith?

A. Yes, I did.

Q. Was any one else present?

A. Mr. Butler was present.

Q. How long was it from the time that Mr. Butler had left you at the parking lot until the time when you reached Mr. Smith's house? Give us your best estimate.

A. I should say ten or twelve minutes, sir.

Q. Would you relate the conversation between you and Mr. Smith and if Mr. Butler entered into it, whatever he said too?

A. I introduced myself to Mr. Smith as an employee who had just been discharged and I told him that Mr. Butler said that he, Mr. Smith, would be able to give me the reason why and so I asked Mr. Smith why I was discharged.

Mr. Smith said, "Well, I wasn't satisfied with your political reporting." And I asked him specifically what reporting he was referring to and he said, "Oh, well, just generally speaking."

I asked Mr. Butler why he had not mentioned that to me during the past two weeks and Mr. Butler said that, well, there had been a general deterioration and I told Mr. Smith that I did not think it was right that I should be discharged without notice, after working on the paper for four years and [396] finally Mr. Smith said, "Very well, we will give you

(Testimony of Sol London.)

two weeks' pay instead of notice." And I told Mr. Smith, "You and I both know the reason for my discharge, and Mr. Smith said, "Well, what is it then," and I don't recall my answer exactly.

I said, "Well, we both know what the real reason for my discharge is" and the conversation was over shortly after that and I left Mr. Smith's house.

Q. Had Mr. Smith at any time before the date of your discharge, ever criticized you for your political reporting?

A. I don't think I was ever introduced to Mr. Smith, sir.

Trial Examiner: The question isn't whether you were ever introduced to him. Let us have an answer to the question.

The Witness: No, sir, he did not.

Q. (By Mr. Grodsky): Did any representative of the management of the Herald American at any time before your discharge, criticize your political reporting to you?

A. No, sir, not that I recall.

Q. Did Mr. Butler at any time prior to your discharge, discuss with you any claim that your work was generally deteriorating.

A. No, sir, I do not believe he did, sir. When I first started in the Long Beach paper he mentioned that I should have more two column heads on my front page stories, and I agreed with him.

Q. Did you change your practice after that?

A. Yes. [397]

Q. When did that take place?

(Testimony of Sol London.)

A. August of 1953, shortly after I became editor of the North Long Beach paper.

Q. After you ceased your employment with the company, did you become an employee of the Newspaper Guild? A. Yes, sir.

Q. And in that connection, did you continue to get in touch with the employees of the Herald American? A. Yes, sir.

Q. Did there come a time when union buttons were worn by the employees? A. Yes, sir.

Mr. Kaufman: Now, just a moment. I am going to object to that question on the grounds that it calls for a conclusion of the witness without a proper foundation, and it is vague as to the purported place where the buttons were supposedly worn.

Trial Examiner: Well, of course, thus far the evidence is no more than what the evidence has already shown. I mean this witness' last statement.

Mr. Kaufman: I do not object to what he says he saw.

Trial Examiner: I am going to let this last answer stand.

Mr. Grodsky: It was merely preliminary.

Trial Examiner: I assumed it was and I assumed it goes no further than what has already been shown. [398]

Q. (By Mr. Grodsky): Did you have any discussion with any supervisor in which the wearing of the buttons was mentioned, answer "yes" or "no"?

A. No.

(Testimony of Sol London.)

Q. Do you recall a discussion with anyone in which the question of union buttons came up in any way?

A. Oh, yes, with the employees of the Herald American.

Q. Now, after the time that the employees had put on their buttons, did you have any discussion at that time with any representative of management?

A. Yes, sir; Mr. Cleland.

Q. When did that discussion take place?

A. On a Wednesday, in front of the Compton office of the Herald American.

Q. Who was present at this conversation?

A. Mr. Ross was present at the latter part of the conversation. [399]

* * *

Q. (By Mr. Grodsky): Were there certain kinds of assignments that Mr. Butler covered himself? A. Yes.

Q. And in the event that Mr. Butler wasn't available to cover them and if Mr. Butler was in the office, was it the custom of [402] Mr. Butler, if you observed, that he would make the assignment as to who would take care of that particular assignment?

A. If Mr. Butler was in the office he would do that.

Q. If Mr. Butler wasn't present, then who would make the assignment of the case or meeting that Mr. Butler himself normally covered?

A. Mr. Cleland usually would.

* * *

(Testimony of Sol London.)

Q. (By Mr. Grodsky): Now, returning again to this Wednesday morning when Mr. Cleland and you were talking and Mr. Ross came up, do you know what date or day that was?

A. It was the day after Mr. Ross had been discharged.

Q. And now, will you tell us what was said by either the two of you or the three of you and indicate who was speaking, with reference to union buttons in that conversation? [403]

Mr. Kaufman: Well, just a moment. I am going to object to the conversation on the grounds that it is hearsay and there has been no proper foundation laid.

Q. (By Mr. Grodsky): What time of the day was it?

Mr. Grodsky: I think I have asked that. I will withdraw the question. It has been asked and answered.

Mr. Kaufman: There may be a ruling by the court.

Trial Examiner: Excuse me, I thought you were going to withdraw the question?

Mr. Grodsky: No, no, no.

Trial Examiner: Let us have a few foundational questions. My recollection is that you did, but the record is a little confused.

Mr. Grodsky: I will withdraw the question then.

Q. (By Mr. Grodsky): Now, Mr. London, the record shows that Mr. Ross was discharged on Au-

(Testimony of Sol London.)

gust 17th, that was a Tuesday? A. Yes.

Q. Then the conversation took place on Wednesday, August 18th, in the morning; at what time in the morning? A. Around 7:30.

Q. And where did the conversation take place?

A. In front of the Compton office of the Herald American.

Q. And who was present?

A. Mr. Ross, myself, and Mr. Cleland.

Q. Anybody else? [404] A. No, sir.

* * *

Q. (By Mr. Grodsky): How did it come about that he said it? What was the conversation that led up to it?

Mr. Kaufman: Same objection.

Trial Examiner: I will overrule it.

The Witness: Well, we were talking about the Guild and my being fired and Mr. Ross being discharged and Mr. Ross asked Mr. Cleland if any one had known about his wearing a union button, and Mr. Cleland said, "Yes, it was known in Compton on Tuesday afternoon." [406]

* * *

Q. (By Mr. Grodsky): Do you remember if he said as to what time of the day it was knowledge at the Compton office about the union buttons being worn? What was said and give it to us as best as you can?

A. I believe Mr. Ross questioned Mr. Cleland

(Testimony of Sol London.)

further and Mr. Cleland said it was about 2:00 on the Tuesday afternoon.

Trial Examiner: While you were still employed by the company, was Mr. Ross working in the same office as you?

The Witness: No, sir, Mr. Ross was in the Lakewood office.

Trial Examiner: And Mr. Cleland was in the same office as you?

The Witness: At the time of my discharge I worked in the North Long Beach office. Mr. Ross worked in the Lakewood office and Mr. Cleland worked in the Compton office.

Q. (By Mr. Grodsky): During the time of your employment at the North Long Beach office, did you have any conversation at any time with Mr. Butler concerning working on Thursday afternoons?

A. Yes.

Q. Now did you have one or more than one conversation?

A. Relating to Thursday afternoons. I believe there was only one. [407]

Q. When did that conversation take place?

A. In Long Beach and at Compton.

Q. About when did it take place?

A. Shortly after I became editor of the North Long Beach paper, perhaps about August or September.

Q. Was any one else present in the conversation? A. No.

(Testimony of Sol London.)

Q. Now, what did Mr. Butler say and what did you say on this occasion?

A. I told Mr. Butler, I believe, that I was working a great number of hours, over fifty hours a week and I told him that I thought I needed, oh, more help at the North Long Beach office, and I also told Mr. Butler because I had been working late on Tuesday nights, I had been taking off on Thursday afternoons.

Q. What did he say, if anything?

A. He said, "I know that as well as you and as long as you turn in your copy, that is all we require." And he said I was doing a good job.

Q. What was your usual practice with reference to working on Tuesdays?

A. Well, Tuesday, I would work to midnight sometimes, and sometimes shortly before midnight, occasionally, and after midnight I would turn in my copy.

Q. That was your usual time—the time you usually worked to [408] on Tuesdays?

A. Yes.

Q. Until about midnight?

A. Well, it varied.

Q. And when did you usually bring in your copy, if you brought in your copy?

A. I would bring in my copy, oh, perhaps about 10:00 or 10:30 but sometimes I would be in Compton—when I first started in North Long Beach, I would work in the evening at Compton after 6:30

(Testimony of Sol London.)

and I would be at Compton all that time, but afterwards I changed my routine.

When I work at Long Beach, I would bring in the copy at 10:00 or 11:00.

Q. You mean in the morning?

A. Tuesday night.

Q. At the times you brought in copy to the office, obviously Mr. Butler was there on occasion?

A. On occasion, he was there, sir.

Q. Estimating now the period of time that you worked at the North Long Beach office, could you give us an estimate of how many times that you came on a Tuesday night and saw Mr. Butler?

A. Oh, probably about ten or fifteen times.

Q. And did he see you on those occasions?

A. Yes, sir.

Q. How do you know he saw you? [409]

A. He greeted me and I greeted him.

Q. (By Trial Examiner): Did anybody ever tell you what your scheduled hours would be at the Long Beach office?

A. No, sir, except that Mr. Butler said I would be required to cover the Long Beach City Council meetings. They met at 8:30 every Tuesday morning and we had a certain make-up deadline.

Q. Did you work on Saturday at the Long Beach office? A. No, sir.

Q. Did anybody else?

A. No, the office was closed.

Q. Do I understand you were the only employee in the office? A. The editorial employee.

(Testimony of Sol London.)

Q. Well, are there any other employees?

A. A classified advertising girl, and two or three circulation—I mean salesmen and a circulation manager.

Q. And when did you normally come in, in the morning?

A. It depended on the day. On Monday, I usually reported in at 9:30; Tuesday, it would be 8:30, Wednesday, I would report in at 8:30 or 9:00; Thursday I would report in at 9:30; and Friday it would be 9:30; Saturday, I would go directly to the Compton office where the make-up was and I usually got there about 6:30.

Q. To what time did you work on Thursday normally?

A. From 9:30 to, oh, 12:30 [410]

Q. Do I understand you usually took the afternoon off on Thursday? A. Yes.

Q. Now, is there a record kept of your time of any kind? Do you punch a clock or anything like that? A. No, sir.

Q. All right. Before we leave the subject of Long Beach, what contact, if any, did you have with Mr. Cleland?

A. Well, we phoned one another regarding certain stories that Mr. Smith would want and I would also phone up the office. The library of the paper was kept in the office and I would ask somebody to see if we had a zinc cast of a certain person.

Q. I don't know what you mean by, "we phoned

(Testimony of Sol London.)

one another regarding certain stories." Did you tell one another stories?

A. He phoned me about certain things. At one time in North Long Beach, Grayson had a dedication case and Mr. Cleland told him he was handling that story and I was to have it on the first page heads.

Q. Tell me about some other stories that he phoned you about?

A. If there were any angles from Compton that involved North Long Beach about a story, Mr. Cleland would phone me to tell me about it, say a police story. If a North Long Beach man was involved in an accident, Mr. Cleland would phone me up about it, and I would run it in the North Long Beach edition.

Q. Now, was there any occasion when he told you that he did [411] not have it?

A. Oh, yes, sir.

Q. Then what did you do?

A. I would probably handle the story myself or I would find out from Mr. Cleland when he would have that story available.

Q. Do I understand that when you were in the North Long Beach office, aside from what Mr. Butler would tell you about covering a news story, you would dig up the news stories and cover them; is that correct? A. Yes, sir.

Q. Now, how long were you in North Long Beach?

(Testimony of Sol London.)

A. Approximately one year I was at the North Long Beach office.

Q. Was it any part of your duty while you were at North Long Beach to find out where the news stories were cooking, so to speak?

A. Well, I had certain contacts. Also, I would check with the Police Department and the City Mall, and there was a civic drive in North Long Beach and I covered that. It concerned the establishment of a civic center in North Long Beach.

Q. Did you have any regular or standard news stories—I am referring particularly to the Police Department?

A. I would receive the information from the Police and if I needed further information, I would check with the detectives. We emphasized a good deal of crime and accidents. Occasionally [412] there was a murder story or a man killed his wife and I covered that by checking with the court clerks.

Q. And when Mrs. Marian Jones married off her daughter, she would get in touch with your newspaper and tell you?

A. We would receive society notes but I sent these to the Compton office. I turned these over to the society editor when I got them over the [413] phone.

* * *

Q. (By Mr. Grodsky): Mr. London, in preparation for your career as a journalist, did you have any journalistic schooling? A. Yes, sir.

Q. Did you attend a professional school?

(Testimony of Sol London.)

A. I attended the University of California.

Q. Did you take courses in journalism?

A. Yes, sir.

Q. In connection with these courses, did you read any material relating to what are syndicated features? A. Yes, sir.

Q. And did you learn from your schooling, criteria by which certain syndicated features can be identified? A. Yes, sir. [414]

* * *

Q. (By Mr. Grodsky): In your work in the newspaper business, have you had any occasion to deal with syndicated material?

A. I have observed syndicated material and I don't quite understand——

Q. Has any of it come across your desk in the course of your duties, that you can remember?

A. We receive releases from the United Press.

Q. That isn't syndicated cartoons, is it?

A. No, sir.

Q. Then, I take it that you have never personally worked with any material of the character of syndicated cartoons?

A. Often in the mail we would receive letters from syndicates asking the paper to subscribe to certain feature cartoons and I would glance through the material enclosed.

Q. And in that way you became aware of what type material syndicates offer? A. Yes, sir.

Q. And was it one of your duties to open the mail at the time in question?

(Testimony of Sol London.)

A. Yes, sir, at Compton. [419]

Q. And did the syndicated material which you are now testifying about, which came over your desk, conform to the description of what you told us you were taught in school as to what are the usual characterizations of syndicated material?

A. Yes, sir. [420]

* * *

Redirect Examination

* * *

By Mr. Grodsky:

Q. Now, during the time when you were at Compton and you [432] handled the mail, did any material from United Press come across your desk?

A. Yes, sir.

Q. What, if anything, did you do with it?

A. Well, opened the mail and I questioned as to who should receive that material.

Q. Whom did you ask it off?

A. I believe Mr. Cleland or Mr. Butler.

Q. Do you remember which one it was?

A. No, not offhand.

Q. What were you told to do with that mail?

Mr. Kaufman: I am going to object as he cannot identify the people as to who it was. If he cannot identify the people, I am going to object to any instructions that he purportedly received.

Trial Examiner: I am not sure that I agree to this. I think his testimony is susceptible of an inference that one of two people were concerned.

(Testimony of Sol London.)

Mr. Kaufman: Well, if Mr. Cleland gave the instructions, it isn't a proper showing.

Trial Examiner: Oh, I am sure there is. I will overrule the objection.

Q. (By Mr. Grodsky): What were you told to do with that mail?

A. Give it to "Home & Garden." [433]

Q. What do you mean when you say "Home & Garden"?

A. Put it in the place in the office where all the "Home & Garden" material was to go.

Q. Is the "Home & Garden" material similar to a magazine incorporated in General Counsel's Exhibit No. 3 for identification? A. Yes. [434]

* * *

(The document heretofore marked General Counsel's Exhibit No. 3 for identification, was received in evidence.) [436]

* * *

Recross-Examination

By Mr. Kaufman:

Q. Mr. London, I believe that you had previously told me that you put in a pretty full day in the newspaper during the years that you had worked there; is that right? A. Yes, sir.

Q. And it was a job that kept you busy from the time you started in the morning until the time you would quit? [437]

(Testimony of Sol London.)

A. Yes.

Q. And on Tuesdays you would have to work late at nights; isn't that right?

A. Yes, sir.

Q. Now, in connection with the Tuesday, if you finished your work early on Tuesday, you went home when you finished, didn't you?

* * *

Q. (By Mr. Kaufman): I take it you never finished early and therefore could not go home early on a Tuesday night?

Mr. Grodsky: I object to that as being vague and indefinite.

Trial Examiner: Well, I will permit it; is that correct?

The Witness: Well, I don't know what he means by "early."

Trial Examiner: Do I understand that you don't understand [438] the question?

The Witness: I don't understand the use of one word in the question, "early."

Trial Examiner: All right, "early."

Q. (By Mr. Kaufman): Sometimes you said you finished as late as 2:00 in the morning on a Tuesday? A. I said after midnight.

Q. Have you ever finished as early as 10:00?

A. Yes, sir.

Q. 9:00? A. I don't recall.

Q. 8:00? A. No, I never have.

Q. And the rest of the time that you were there,

(Testimony of Sol London.)

you considered you had a fulltime job? The job took you full time to adequately cover it, especially when you were at the Long Beach office?

A. Yes, sir.

Mr. Grodsky: I object to it as compound.

Mr. Kaufman: Well, strike the question.

Q. (By Mr. Kaufman): You were in the Long Beach office when you were fired? A. Yes.

Q. And when you were in that office in particular, I believe you were the only man covering editorial news; is that [439] correct? A. Yes.

Q. And as such, besides putting a great deal of time on your work, you worked very, very hard, so that you requested additional help at one time; isn't that correct? A. Yes.

Q. Now the reason that you requested additional help was so that you could more adequately and better cover the news that you were writing?

A. That is one of the reasons.

Q. Now when did you start your work with the union, sir?

A. Oh, I believe it was in the latter part of April.

Q. And at that time you were not as you are now, drawing any salary from the union, were you?

A. I was drawing no salary from the union.

Q. In April when you first started, what did you start to do?

A. As far as the union is concerned?

Q. Yes, certainly.

(Testimony of Sol London.)

A. We signed up a number of people on the Guild application cards. [440]

* * *

Q. (By Mr. Kaufman): Is it your testimony here in this court room that you never at any time contacted any of the other employees during their duty hours, when you were organizing the Compton Herald American or any other Herald American newspaper? [442]

* * *

The Witness: There were certain times of the day when an employee might be called at work but he would be off on the lunch break or the coffee breaks.

Mr. Kaufman: Now, would you answer my question?

The Witness: Yes, during a lunch hour and coffee breaks.

Q. (By Mr. Kaufman): Now, did you at any time not during the lunch hour or coffee breaks contact any of the employees with the purpose of discussing the union? A. I don't recall.

Q. You don't remember any?

A. I don't recall any at this time.

Q. Would you say that you had not?

A. I could not say definitely that I had not.

Q. Did the people have a fixed hour for coffee breaks? A. Not necessarily.

Q. Well, what would you do? Did you see them out of their [443] working hours and quit what you were doing and meet them when you had a coffee

(Testimony of Sol London.)

break? A. We often had coffee together.

Q. Did you plan that?

A. No, a person doesn't like to have coffee by himself.

Q. But you were the only one at the Long Beach office; you came to other offices to do your organizing?

A. I never went to other offices to do any organizing while I was an employee of the Herald American.

Q. You did not?

A. Not to actually organize.

Q. Well, to attempt to get people to join the union? A. Not in the office itself.

Q. But you went into the offices and you talked to people for that purpose?

A. I may have spoken to people but it was outside of the work and I did not go to a specific office to ask a person to join the Guild.

Q. How many people during this time you were still employed by the Herald American did you talk to about joining the Guild?

A. Well, I don't want to involve any one by giving the names of these people.

Q. I am not asking you for any names.

Trial Examiner: Just listen to the question, Mr. London. [444] He wants an approximation. If you cannot give the exact number——

The Witness: I would say about seven or eight people.

(Testimony of Sol London.)

Q. (By Mr. Kaufman): And you talked to them, oh, more than once naturally?

A. On occasions.

Q. Wouldn't it be fair to say that the conversations were more than one minute or two in duration? A. Yes.

Q. Actually, when you would talk to a man about union activities or a woman, you would not be performing your paid for task, would you?

A. It would depend on when I was talking about the union activities, sir.

Q. Well, when you came into the local office from the Long Beach office, you normally had a reason, had you not? A. Yes, on make-up days.

Q. Or on other days?

A. Well, it would be in reference to something about the paper.

Q. And normally you would try to get back as fast as you could because you were overworked and you had to be back on the job?

A. That isn't exactly correct. On make-up days, Wednesday, I would get to the Compton office and then I would turn in the [445] copy I had and then I would make up. And after that, I would go home. On Saturday it was about the same.

Q. One conversation you testified to took place on a Tuesday, didn't it?

A. Yes, I was at the Compton office off and on to turn in my copy.

Q. Well, this could have taken place on a Tuesday? A. I cannot say that.

(Testimony of Sol London.)

Q. You could have had conversations which took place on a Tuesday? A. It is possible.

Q. While you were having these conversations, nobody was in the Long Beach office covering your job? A. It wasn't necessary.

Q. I said, nobody was in the Long Beach office covering your job while you were having these conversations, were they? Just answer the question, please.

A. I cannot answer that by a "yes" or "no" answer, sir, without an explanation.

Q. Was any one in the Long Beach office covering your job, when you were having these conversations? That is, when you were over in Compton.

A. I was the entire staff of the Long Beach editorial staff.

Q. Now, when you were attempting to organize for the union for these several months, did you at any time contact Mr. [446] Butler and ask him to belong to the union?

A. No, sir, I did not.

Q. Because you knew he was management; is that correct? A. One of the reasons.

Q. Well, they told you and you acting as an organizer, knew that you could not contact management?

A. Well, for one thing, we knew definitely that Mr. Butler was part of management and——

Mr. Kaufman: All right.

Mr. Grodsky: Let him finish his answer.

(Testimony of Sol London.)

Mr. Kaufman: It wasn't responsive.

Trial Examiner: Well, if it wasn't responsive, I think the thing to do is to move to strike the unresponsive question or ask me to strike the answer.

Mr. Kaufman: The witness has a tendency of being unresponsive and more so than the average witness.

Mr. Grodsky: I object to that.

Trial Examiner: I will tell this witness. Your obligation is to answer a question and not go beyond that. It isn't necessary for the witness to play lawyer. Just answer the questions and do not go beyond them.

The Witness: Yes, sir.

Trial Examiner: Go ahead, sir.

Mr. Kaufman: Could I have the last question read, please? [447]

(Question read.)

The Witness: I realized that top management would be out.

Q. (By Mr. Kaufman): Do I take it there, sir, that you are endeavoring to make a distinction between management and top management for this record? A. No, sir, I am not.

Q. Then why use the word "top"?

A. Well, Mr. Butler is very close to Mr. Smith, that is the main reason.

Q. Isn't it also true that you knew you did not organize management and that is why you didn't see Mr. Butler; isn't that true? A. Yes.

(Testimony of Sol London.)

Q. It was or otherwise? A. Yes.

Q. Now, one of the men you did attempt to organize is a Mr. Cleland? A. Yes.

Q. And when you saw Mr. Cleland, I believe you testified your first discussion was on a Tuesday?

A. I believe I first discussed this with Mr. Cleland on a Saturday.

Q. Well, you had one discussion, I believe, that you said was on July 10th; would that be a Saturday?

A. Yes, sir, to my recollection it was [448]

Q. Did you ever have a discussion with Mr. Cleland not on a Saturday?

A. Yes sir, on the Wednesday following that Saturday.

Q. During the time you had this discussion with Mr. Cleland, I believe you stated you were on your way to or from a coffee break?

A. On Saturday July 10th.

Q. About what time of the morning was it?

A. After I had completed the make-up on Saturday.

Q. What time of the morning?

A. Between 11:00 and 12:00.

Q. Didn't you say before it was around 11:00?

A. I don't recall.

Q. You recall very clearly that you had finished the make-up? A. Yes, sir.

Q. Do you know if Mr. Cleland finished his make-up? A. He wasn't making-up then.

(Testimony of Sol London.)

Q. Do you know if he had finished entirely for the day?

A. I don't know if he had finished for the day.

Q. How long were you in the coffee shop?

A. Five or ten minutes.

Q. And when you were talking, Mr. Cleland went back to work, you testified didn't you?

A. Yes, sir.

Q. Now, sir, do you usually finish your work by 11:00 [449] o'clock on a Saturday morning?

A. It varied. [450]

* * *

Recross-Examination
(Continued)

By Mr. Kaufman:

Q. Mr. London, did you do any soliciting or attempted soliciting by telephone at all?

A. I made appointments by telephone.

Q. I am talking now if I may, and I should redirect this question to you during the period you were employed by the Herald American or by the newspaper; did you make appointments by telephone? A. Yes, I believe I did.

Q. And for that you used the company telephone; is that correct?

A. I believe I did, yes, sir. [454]

* * *

(Testimony of Sol London.)

Redirect Examination

By Mr. Grodsky:

Q. Mr. London, you testified that you worked Tuesday nights until time after 9:00 p.m. roughly speaking? A. Yes, sir.

Q. Now, have you reconsidered that testimony since you gave that testimony and do you have any change to make?

A. I would like to qualify that testimony I gave this morning. On occasion, I would take work home and type out the stories at home Tuesday night after 8:00 o'clock and I brought the copy in later.

Trial Examiner: You brought it in later; do you mean at night?

The Witness: No, the next morning, sir. [469]

Q. (By Mr. Grodsky): And on those occasions, you would leave the office by when?

A. I should say about 8:00.

Q. And about how frequently during the year when you were at Long Beach did this happen?

A. Oh, six or seven times, sir.

Q. Now, in response to a question by counsel, you said that one of the reasons why you did not ask Mr. Butler to join the union was because you knew that he was part of management? A. Yes, sir.

Q. Did you have any other reasons in mind why you did not ask Mr. Butler to join the union?

A. Yes, sir, I did.

(Testimony of Sol London.)

Q. Can you tell us what the reasons are?

Mr. Kaufman: I am going to object as it is irrelevant, immaterial and incompetent and not proper redirect examination.

Trial Examiner: I will overrule the objection.

The Witness: While I worked at Compton, Mr. Butler made a lot of anti-union statements and I was led to believe that he was very strictly anti-union.

Q. (By Mr. Grodsky): You testified in response to a question that you used the phone to make appointments with reference to your union activity, your union organizing; do you remember that testimony? A. Yes, sir. [470]

Q. Will you explain how you happened to use the phone; in other words, were you making the call specifically for that purpose or was it in another fashion?

Trial Examiner: Mr. Grodsky, do not lead the witness. I know you are not doing it intentionally but the end result is the same, I think.

Mr. Grodsky: I am sorry.

Mr. Kaufman: I will stipulate that he will answer he was doing it on——

Mr. Grodsky: I don't know what his answer is.

Trial Examiner: Let us have an answer. I have no objection to the question and I am constrained to complete the record please. Go ahead, sir.

The Witness: Would you repeat the question, please.

Mr. Grodsky: I will rephrase it.

Q. (By Mr. Grodsky): How often do you re-

(Testimony of Sol London.)

call did you make appointments by telephone with reference to solicitations?

A. Not more than two times a week.

Q. And will you tell us what nature these calls were, without giving us any names?

A. It may have been in reference to news stories or matters concerned with the paper and I also brought in the fact that I would like to see the party some time.

Q. When you said you spent a considerable amount of your time in that period in union organizational work—— [471]

Trial Examiner: He did not so testify. That was Mr. Kaufman's characterization. The witness said he did not know what he meant by a considerable amount of time and he testified, "I spent time on it."

Mr. Grodsky: All right.

Trial Examiner: Go ahead, sir.

Q. (By Mr. Grodsky): Now, Mr. London, when did you start taking your Thursday afternoons off?

A. Shortly after I became editor of the North Long Beach Herald American.

Q. When you became editor, did you have occasion to discuss your duties with a man who preceded you in the position? A. Yes.

Q. What was his name?

A. John Bevill.

Q. Did you discuss his working hours with him?

A. Yes, sir. [472]

* * *

(Thereupon the document heretofore marked General Counsel's Exhibit No. 16 for identification, was received in evidence.) [487]

* * *

GENERAL COUNSEL'S EXHIBIT No. 16

Payroll Records of Salaries Paid the Following Employees Previous to July 18, 1954

5. The payroll records disclosing names and classifications of all editorial employees, classified advertising solicitors, PBX operators, and cashiers on and at all times after March 1, 1954.

Editorial:

Jack Cleland, City Editor, $110.00;
W. L. Sheets, Division Editor, $85.00;
Oney Fleener, (Transferred), $80.00;
Jean Jolley, Norwalk Editor, $75.00;
Laurence Moshier, Bellflower Editor $75.00;
John Echeveste, Reporter, $75.00;
Helen Farlow, Society Editor, $65.00;
Sol London, Long Beach Editor, $75.00;
Jerome Syverson, Downey Editor, $60.00;
Doris Zerby, Reporter, $55.00;
Anthony Derry, Reporter, $65.00.
Mary Jo Clements, Magazine Editor, $65.00;
Norma Montgomery, Reporter, $60.00;
Marion Mattison, Society Editor, $55.00;
Barbara Heath, Society Editor, $50.00;
William Edmond, Reporter, $60.00;

Howard Handy, Part-time Sports Editor, $37.00;
Maxine Galt, Society Editor, $50.00.

Classified:

Leonard Lugoff, Classified Manager, $125.00;
Robert Raschdorf, Classified Sales, $90.00;
Franklin Marshall, Classified Sales, $80.00;
Dorothy Bush, Classified Sales, $90.00;
Dorothy Holt, Classified Clerk, $70.00;
Virginia Streeper, Telephone Sales, $62.50;
Andrea Olson, Telephone Sales, $62.50;
Ruth LaFave, Telephone Sales, $62.50;
Elizabeth Herb, Telephone Sales, $62.50;
Dale Neumann, Telephone Sales, $62.50;
Marie England, Telephone Sales, $65.00;
Barbara Baker, Telephone Sales, $67.50;
Katherine Grant, Telephone Sales, $70.00;
Virginia Fletcher, Classified Counter, $50.00;
Bertha Reid, Telephone Sales, $62.50;
Gloria Hickey, Telephone Sales, $62.50.

Cashiers & PBX:

Ellen Beetler, General Cashier, $75.00;
Beatrice Kirschner, Cashier & PBX, $60.00;
Erma Whertley, Cashier & PBX, $57.50;
Doris Farley, Cashier & PBX, $55.00.

6. Name and date of employment of all editorial employees employed after March 1, 1954.

Earl Griswold, October 11, 1954, $80.00;

Carl Widner, September 2, 1954, $70.00;
Raymond Ross, March 22, 1954, to August 17, 1954, $65.00;
Barbara Heath, Feb. 15, 1954, to June 11, 1954, $50.00;
Donald Desfor, May 29, 1954, to Sept. 4, 1954, $60.00;
Arnold Collins, Aug. 9, 1954, to Aug. 17, 1954, $65.00.

7. Name and date of termination of all editorial employees terminated after July 1, 1954.

Raymond Ross, Aug. 17, 1954;
Sol London, July 16, 1954;
William Edmond, Aug. 18, 1954;
Donald Desfor, Sept. 4, 1954;
Arnold Collins, Aug. 17, 1954.

8. Name and date of employment of all classified advertising solicitors employed after March 1, 1954.

Edith Zink, July 13, 1954, $57.50;
Dorothy McGuire, July 12, 1954, $65.00;
Lucille Pfershy, July 14, 1954, $55.00;
Mary VanAllen, March 29, 1954, $62.50;
Patricia Beck, May 25, 1954, $62.50;
Gloria Hickey, April 12, 1954, $62.50.

9. Name and date of termination of all classified advertising solicitors terminated after August 1, 1954.

Gloria Hickey, Aug. 17, 1954.

10. Names and date of employment of all PBX operators and cashiers after June 15, 1954.

Helene Larson, June 14, 1954, $60.00;
Doris Farley, June 28, 1954, $55.00;
Fayette Petty, Sept. 1, 1954, $57.50;
Marion Cronk, from part to full time Aug. 30. 1954, $50.00.

11. Names and dates of termination all PBX operators and cashiers after August 1, 1954.

Helen Larson, Aug. 27, 1954;
Doris Farley, Aug. 17, 1954.

12. A list of all pay increases and bonuses given to editorial employees and classified employees from July 1, 1954, to date, listing the name of employee, date of increase or bonus and amount of increase or bonus.

Jack Cleland, July 18, 1954, $15.00;
William Sheets, July 18, 1954, $15.00; Aug. 22, 1954, $25.00;
Jean Jolley, July 18, 1954, $10.00;
Raymond Ross, July 18, 1954, $5.00;
Laurence Moshier, July 18, 1954, $5.00; Aug. 29, 1954, $10.00;
John Echeveste, July 18, 1954, $5.00; Aug. 22, 1954, $10.00;
Helen Farlow, Oct. 24, 1954, $5.00;
Doris Zerby, July 18, 1954, $10.00;
Elaine Marable, July 18, 1954, $10.00;

Jerome Syverson, July 18, 1954, $15.00; Aug. 29, 1954, $5.00;
Anthony Derry, July 18, 1954, $10.00; Aug. 29, 1954, $5.00;
Mary Jo Clements, July 18, 1954, $10.00;
Marion Mattison, July 8, 1954, $10.00;
William Edmond, July 18, 1954, $15.00;
Florence Francoeur, Aug. 29, 1954, $5.00 (Proofreader).

Received in evidence December 9, 1954.

LOUIS M. MURRAY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kaufman:

Q. Mr. Murray, what is your business or occupation? A. Advertising.

Trial Examiner: Could we have the witness' name and address, please?

Q. (By Mr. Kaufman): Would you state your name, please? A. Louis M. Murray.

Q. And your address?

A. 3203 Josie, Long Beach.

Q. What is your business or occupation?

A. Advertising.

Q. By whom are you employed, sir?

A. Herald American. [490]

(Testimony of Louis M. Murray.)

Q. Now, sir, did you ever attempt a surveillance of what you believed to be a union meeting on or about July 17, 1954, or any other time?

A. No.

Q. Were you ever asked by any of your superiors of the newspaper for which you were employed to make or attempt to make any such surveillance?

A. No.

Q. Do you know a Mr. Sheets?

A. Yes, sir.

Q. Did you ever go to his home in connection with a so-called horse-shoe incident? A. Yes.

Q. Would you tell me, please, the circumstances surrounding this?

A. For a number of years, I have known Sheets, three or four years, and he has had a liquor problem and I overheard him make a remark that he was going to play horseshoes which to me was synonymous to opening a keg of nails, and for that reason I tried to locate Sheets in the afternoon, and talked to his wife, and later on, he, himself and I determined that he was sober and that satisfied me that the old problem did not recur.

Q. Did you ever tell him that you were checking to see if he was engaged in a union meeting? [491]

A. No.

Q. Or that you thought horse-shoes was some type of word with the understanding that it meant a union meeting or anything like that?

A. Just prior to that time, Bill had just moved into a new house and knowing his customary habit

(Testimony of Louis M. Murray.)

over a long period of time, I knew that he did not play horse-shoes.

Q. Did you ever see any employee, and I am calling your attention particular to either Ray Ross, Gloria Hickey, Doris Farley, wearing a union button on or about the 16th, 17th or 18th of August, 1954, in the offices of the Compton Herald American? A. The dates I cannot—no.

Q. Can you tell me whether or not you fired any of those people? A. No.

Q. Neither Gloria Hickey nor Farley?

A. No.

Q. Was Gloria Hickey in your department?

A. No.

Q. Was Doris Farley? A. No.

Q. Did you take a check on the morning of the 18th of August to Miss Farley?

A. Yes. [492]

Q. And was Miss Farley in your department?

A. No.

Q. Who had instructed you to take that check over?

A. I was simply asked to deliver the check.

Trial Examiner: The question is, who asked you?

The Witness: I am not clear on that.

Q. (By Mr. Kaufman): You just remember you brought it over? A. That is right.

Q. She wasn't in your department, is that right?

A. That is right.

(Testimony of Louis M. Murray.)

Q. Did you ever discharge any one for union activities? A. No. [493]

* * *

LEONARD LUGOFF

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kaufman:

Q. What is your full name?

A. Leonard Lugoff.

Q. What is your business or occupation?

A. Classified advertising.

Q. Who is your employer?

A. Herald American.

Q. How long have you been so employed?

A. Oh, going on fifteen years.

Q. Are you in charge of any department?

A. Classified advertising.

Q. Did you ever receive orders from any of your superiors to fire anyone because of union activities? A. No, sir.

Q. Did Colonel Smith or Mr. Brewer or Mr. Butler ever give you any orders to fire anybody because of union activities? A. No, sir.

Q. I take it that no one in the organization above you gave you any orders?

A. That is right.

Q. Do you remember a Mrs. Hickey?

(Testimony of Leonard Lugoff.)

A. She worked in my department. [503]

Q. Did you ever fire a Mrs. Hickey?

A. I did.

Q. Did you ever fire her because of any union activities? A. No, sir.

Q. What was the purpose of her being discharged?

A. I was given instructions to cut down by one in my department for economy reasons, and after due thought I let Gloria Hickey go.

Q. Whose department was Doris Farley in, do you know?

A. I think she was directly under——

Q. Mr. Brewer? A. Mr. Brewer.

Q. In any event, the only one you fired was Gloria Hickey; is that right?

A. That is right.

Q. Did you ever tell Mrs. Hickey prior to her being fired at any time that you were glad she wasn't tide up with the Guild? A. No, sir.

Q. Did you ever question her as to any Guild tie-up? A. No, sir.

Q. Did you ever tell her that Colonel Smith had given instructions or would fire everyone in the whole department if he did not learn who was the person organizing?

A. Colonel Smith never discussed unionism with me in any way, [504] shape or form.

Q. Did you ever tell her that? A. No.

Q. Did you ever tell any other employee that?

A. No.

(Testimony of Leonard Lugoff.)

Q. That Colonel Smith had told you——

A. No.

Q. I don't know whether I have asked you this or not. I may be repeating myself. Did you ever question any employee as to whether or not they had a union affiliation? A. No, I did not.

Trial Examiner: By the way, who told you to discharge an employee?

The Witness: The cut-back economy measure was instituted by Colonel Smith and told to me by Mr. Brewer.

Trial Examiner: I take it, it was Mr. Brewer who told you to discharge an employee?

The Witness: Yes, to cut down one employee.

Trial Examiner: Prior to the time that you discharged any one, did you see any one wearing a union button?

The Witness: No, I did not and to be perfectly frank, I would not recognize a union button if I was shown one.

Mr. Kaufman: Nothing further.

Cross-Examination

By Mr. Grodsky:

Q. Mr. Lugoff, weren't you formerly a [505] Guild member? A. Yes.

Q. Didn't you have a union button?

A. It was so long ago I don't remember having a union button.

Q. Now, the evidence in this case discloses that Gloria Hickey was—oh, strike that. Do you recall—

(Testimony of Leonard Lugoff.)

strike that again. Do you remember when you discharged Gloria Hickey? A. I do.

Q. What day or date was it, if you recall?

A. Approximately I think about the middle of August. I don't know the exact date. It was in the earlier part of the week. She was supposed to be let go that week and we gave her three or four days leeway on it and we paid her to the end of the week.

Q. How long before?

Trial Examiner: You paid her to the end of the week, you said?

The Witness: And let her go on Tuesday.

Trial Examiner: Why didn't you let her stay until the end of the week?

The Witness: Well, when you let a person go, you give them time to look for another job. It is very seldom that you keep a person working to the end of the week. That is courtesy on the part of the management.

Q. (By Mr. Grodsky): When, in terms of the time that you [506] discharged Mrs. Hickey, when before that did Mr. Brewer tell you that you would have to discharge an employee?

A. That was taken up, as I recall, in the latter part of the preceding week, and it was up to me to determine from my employees who I was to let go.

Q. Could you give us a more definite time? You told us Mrs. Hickey's last working day was on a Tuesday. A. That is right.

(Testimony of Leonard Lugoff.)

Q. The record here will show that that particular date was Tuesday, August 17th.

A. All right.

Mr. Kaufman: Alleged in the complaint is August 18th. Is that an error?

Mr. Grodsky: No, Mrs. Hickey said she was told about it on the 18th, in the morning.

Mr. Kaufman: I thought you said Tuesday was August 18th?

Mr. Grodsky: Tuesday was the 17th.

Trial Examiner: General Counsel's Exhibit No. 6 prepared by the company shows the termination date of August 17th. The evidence of both Mrs. Hickey and Mrs. Farley is that they were told they were discharged on August 18th. I don't believe it makes very much difference.

Mr. Kaufman: I don't believe it makes any.

Mr. Grodsky: No.

Trial Examiner: But I think the witness might assist [507] himself by looking at a 1954 calendar. Here is a calendar that may help you with the question that Mr. Grodsky asked you.

The Witness: It was in the morning but I honestly don't know whether it was Tuesday or Wednesday.

Trial Examiner: Here is August 17th, 1954, which is on a Tuesday and the 18th was on a Wednesday, and Mr. Grodsky was talking, I believe, about the preceding week and so were you and here is the calendar.

(Testimony of Leonard Lugoff.)

The Witness: I recall a little bit better now. I called Gloria up on a Tuesday late and she said—well, I didn't want to interrupt her work of the company by calling earlier, and she said she could not wait to see me but she said she would see me in the morning.

That was Wednesday morning, but I was going to tell her about the termination on Tuesday night.

Q. (By Mr. Grodsky): Did she have regular hours? A. Yes.

Q. What were those hours?

A. 8:30 to 5:00, week-days.

Q. Do you know what time of the day on Tuesday or night, this telephone call was?

A. Around 5:00.

Q. Did you telephone her or did she telephone you?

A. I telephoned her that I would like to have her stand by as I was coming down to see her. [508]

Q. Could it be that she telephoned you to give her line count?

A. It could be because she does that.

Q. Could it be that the call was at 6:00 o'clock approximately?

A. I don't think so because she never phones it up that late.

Q. The question is whether on this day in question, she did work that late?

A. I don't recall.

Q. Do you have any positive recollection either way?

(Testimony of Leonard Lugoff.)

A. No, except that it was near the termination of the day, and she had to go to see her husband and she just couldn't wait.

Q. How long before that had Mr. Brewer given you instructions to discharge an employee?

A. The latter part of the preceding week.

Q. Looking at the calendar now, will you give us the best approximation of that date?

A. I would say either the 13th or the 14th of August.

Q. And what did Mr. Brewer instruct you to do?

A. He said there was an economy measure going on and that I had to lay off one person in my department. He did not tell me which person it was.

Q. He didn't tell you which person to let go?

A. No. [509]

Q. Did he tell you when you had to lay off a person? A. Yes, he did.

Q. Did he give you a deadline? A. Yes.

Q. What was the deadline?

A. The following week.

Q. How did you happen to select Mrs. Hickey for the layoff?

A. Well, she had been working four months. She started in April and terminated in the middle of August. When she came to me, she came very poorly recommended and I took a chance on her and during the time that she worked there, there was a lot of friction that I wasn't getting from other girls and because of that friction, I decided that she was the girl to go.

(Testimony of Leonard Lugoff.)

Q. With whom was that friction, do you recall?

A. Just between myself and her. Every time I corrected her, for example, she took it personally that I was picking on her and there was just incompatibility there that I did not get from the other people in the department.

Q. (By Trial Examiner): Were you in the office on Monday? A. Of that week?

Q. The day before August 17th?

A. At the Bellflower office where she worked?

Q. Yes. A. Yes.

Q. Was she? [510] A. Yes.

Q. And was she there all day?

A. Yes. One day I called up the switchboard girl and asked for Gloria, and she said she was on her ten-minute coffee break, but she took about an hour.

Incidentally I got a report previously from somebody that she was shirking her work.

Q. May I suggest, sir, that we are talking on the question of whether a certain person was in the office on a certain day. A. She was there, yes.

Q. Were you in the office on Tuesday 17th?

A. No.

Q. You were absent on the 17th?

A. I was at the Compton office, not in the Bellflower office.

Q. Was she at the Compton office at all?

A. No, she was in the Bellflower office at all times.

Q. Do you recollect whether you had occasion to

(Testimony of Leonard Lugoff.)

talk to the Bellflower office on Tuesday?

A. Oh, yes.

Q. I take it she called you from the Bellflower office when she called you on Tuesday?

A. Yes, before she left. They had a habit of calling me and giving me their lines, so that at that time, I wanted her to wait.

Q. Had you spoken to her earlier that [511] day? A. Yes.

Q. On the telephone? A. Yes.

Q. Once?

A. Probably several times. A great many things come up in relation to their work and I have to phone them there many times. She was on the job on Tuesday.

Q. I want you to think back a little bit and perhaps you can refresh your memory whether you called Mrs. Hickey on Tuesday when this conversation occurred about 6:00 or the following day?

A. To be perfectly frank with you, I don't know whether I called her or she called me, but the conversation took place as part of a conversation.

Q. I understand you have no recollection of calling her at all?

A. The only thing I recollect is I wanted to let the girl go that particular night. Now, ordinarily I would not call her except for something specific. She would call me up and give her lineage report. Now, I may have called her because of some question on that.

(Testimony of Leonard Lugoff.)

Q. Did you have any friction with her on Monday or Tuesday?

A. No, no particular friction on any particular day. It was just a thing that had been going on.

Q. Had you any friction on Monday or Tuesday?

A. No, there wasn't any more friction than on any other day [512] during the time she worked there.

Q. I simply wanted to know if you had any friction with her on Monday or Tuesday?

A. I don't recollect.

Q. Was it because of any friction on Monday or Tuesday that entered into your decision to discharge her? A. No, it wasn't.

Q. (By Mr. Grodsky): Now, you testified in part that she came poorly recommended?

A. Yes.

Q. In what way was she poorly recommended?

A. She came from the Norwalk Call. I asked Miss Donovan what type of girl she was. She said she was very disappointed with her. She said she had a nice appearance but she took advantage of her job and wasn't as good in soliciting as she should have been.

Q. Did you know whether she had any prior experience before working in the Norwalk Call?

A. Yes, the San Diego Union.

Q. Is that a daily paper? A. Yes.

Q. In San Diego? A. Yes.

(Testimony of Leonard Lugoff.)

Q. Do you know whether or not that paper has a union contract? [513]

A. I honestly don't know whether they have or they haven't.

Q. In point of time, after Mr. Brewer told you that you would have to let someone go, did you make a decision that Mrs. Hickey would be the one that you would let go?

A. Over the week end.

Q. In other words, by Monday morning when you came to work, then you had already in your mind, you had made up your mind that Mrs. Hickey was going to go?

A. Yes.

Q. Is there any particular reason why you selected Tuesday night to notify her?

A. Yes, I wanted to give her a break to look around for another job but I did not want to hurt the company in the meantime. Monday and Tuesday are very busy days and if she had been let go on Monday, I would have had to put a new girl on that particular job, which would cut the lineage and so forth.

Q. You testified that you had had reports at previous times that she was shirking her work?

A. I had one previous time and I didn't pay too much attention to it until I called two or three days after and she had been out on her ten-minute coffee break for one hour.

Q. From whom did you have that report?

A. The previous switchboard operator who was

(Testimony of Leonard Lugoff.)

working down there before Doris Farley worked there.

Q. Did you talk to Mrs. Hickey about her shirking her work? [514] A. I certainly did.

Q. (By Trial Examiner): By the way, who did, if anybody did, take over Mrs. Hickey's work on the following Monday and Tuesday?

A. I moved the girl from the Lakewood office and combined the work of the two offices. I did that some Wednesdays. In other words, I called up the girl at Lakewood. And then I told Mrs. Hickey I wanted to see her.

Q. Do I understand that it would not have been necessary for you to hire somebody else; is that right? A. That is right.

Q. To do Mrs. Hickey's work on Monday?

A. That is so.

Q. But you didn't——

A. I didn't want to put a new girl on that particular job. I did want to give Mrs. Hickey a break, and I didn't want to hurt the company and so she was paid to the end of the week.

Q. By a "new girl" do you mean a newly hired girl or a girl from another territory?

A. A girl from another office, yes.

Q. Had this other girl ever worked at the Bellflower office? A. Yes.

Q. Had she worked there a number of times?

A. She originally started at Compton and had worked in Bellflower. [515]

(Testimony of Leonard Lugoff.)

Q. How long had she worked at the Bellflower office, this replacement person?

A. I would say three months.

Q. And how long was that before Mrs. Hickey came to work there?

A. It was the previous three months.

Q. Do I understand then that Mrs. Hickey succeeded to the duties of this girl who later on succeeded to Mrs. Hickey's duties; is that right?

A. That is right.

Q. And if I understand correctly, she wasn't new to the job when you referred to her as a "new girl"?

A. She wasn't new to the job but I was cutting down and I was combining those two jobs. I felt that my lineage was going to drop and I did not want to have that. Primarily I wanted to keep Gloria Hickey on and give her a break.

Q. Do I understand that what you had in mind was that this girl who had worked for three months in Gloria Hickey's duties, if she came over on Monday to take Gloria Hickey's place, that there would be a drop in lineage as a result of that?

A. I had that thought in mind because I was working a girl and was combining two territories with one girl and I thought I would lose in lineage.

Q. Did that happen the following Monday?

A. Yes, it did. [516]

* * *

Q. (By Mr. Grodsky): This discharge hap-

(Testimony of Leonard Lugoff.)

pened during the summer vacation period did it not? A. Yes.

Q. And during that period you are normally shorthanded are you?

A. I have got a relief girl. I wasn't shorthanded. However, this economy measure wasn't of my choosing. It was something I was ordered to do and I just had to take the order.

Q. By "relief girl" do you mean a girl who takes the place of a girl who is on vacation or sick? When you say you have a "relief girl," you mean a girl who isn't in your department?

A. No, she is in my department but she is normally on call for relief work or helping out when she isn't doing that.

Q. Now, since the time of Mrs. Hickey's discharge, you have been shorthanded, haven't you?

A. That is right. [519]

* * *

Recross-Examination
(Continued)

Trial Examiner: Put your question, Mr. Grodsky?

By Mr. Grodsky:

Q. You keep track of the lineage of the various employees? A. Yes.

Q. How was the lineage of Mrs. Hickey as compared, let us say, with the girl who had the same position that she had had previously?

(Testimony of Leonard Lugoff.)

A. It was a little bit lower. Since then, I have got another girl on it and in dollars and cents it has jumped, I would say almost 40% to 50%.

Q. Do you know of any reason for the jump in lineage since then? A. A better girl. [521]

* * *

C. S. SMITH

a witness recalled by and on behalf of the Respondent, being previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Kaufman:

Q. Mr. Smith, we had a discussion earlier about some sardines and advertisements in connection with them; do you remember that discussion, sir?

A. I do.

Q. Have you had an opportunity since I called you last to refresh your memory as to how the advertisement is placed for [525] the sardines?

A. I have.

Q. And what did you find out?

A. I had a letter found in our files which explained the matter.

Mr. Kaufman: For the record, while counsel is examining the letter, I might state that it is short. I did not have an opportunity to see it but less than a moment ago. As a matter of fact, I have not even read it, but I didn't want to hold up the hearing,

(Testimony of C. S. Smith.)

so, rather than attempting to introduce this in duplicate or to waive your rule, I have no objection if counsel hasn't, to having this letter read into the record, and then we will not have to have it in as an exhibit.

Have you any objection, counsel?

Mr. Grodsky: I am going to object to this letter.

Trial Examiner: It has not been offered yet really.

Mr. Kaufman: I want the witness to read it into the record.

Trial Examiner: I assume, Mr. Smith, you have seen this letter before?

The Witness: I have, sir. It was brought to me this afternoon. I promised the Court that I would try and find out where that ad came from on the sardines.

Trial Examiner: Yes. What would this go to establish, Mr. Kaufman? [526]

Mr. Kaufman: Let me use it as an aid to memory and I will continue asking the questions. I will not put it in if it doesn't establish anything.

Trial Examiner: It may very well, but you will persuade me in a moment if you can tell me.

Mr. Kaufman: I am attempting to show that this ad in relation to the sardines is placed through local advertising agencies and I believe this letter should so show.

The Witness: It was placed by Beesemyer-Ridnour Company for merchandise which they owned and were advertising.

(Testimony of C. S. Smith.)

Trial Examiner: I will receive it in evidence and in lieu of that, I will permit him to read the letter into the record.

I have some hesitancy for lack of foundation but I have heard no objection on that ground.

Mr. Grodsky: I started to object. I was objecting to the admission of this letter as an exhibit and the record will so show.

Trial Examiner: But on what ground?

Mr. Grodsky: It is a self-serving document. It is an improper method and it is hearsay.

Trial Examiner: Well, let us get first things straight first. Have you any objection on the ground of foundation, that is, that there is no evidence as yet that Beesemyer-Ridnour Company by Frank Beesemyer wrote a letter to the [527] Herald American?

Mr. Grodsky: No.

Trial Examiner: And it was received by them in the usual course of business?

Mr. Grodsky: No, I will stipulate to those facts.

Trial Examiner: Being over that hurdle, I am going to receive that letter simply as evidence of the business transaction or a business transaction by the newspapers, between them and the Beesemyer-Ridnour Company, concerning Norway sardines.

Whether or not it is connected up with particular sardines or a particular advertisement, I will let the record speak for itself.

Mr. Kaufman: Mr. Smith, would you read the letter into the record, please?

(Testimony of C. S. Smith.)

Trial Examiner: Mr. Grodsky, do you have any objection to the form here, that is, of reading it into the record?

Mr. Grodsky: I have no objection to the form but to the admissibility.

Trial Examiner: This is a letter from the letterhead of Beesemyer-Ridnour Company, 1340 East Sixth Street, Los Angeles 21, California. The letter is dated February 5, 1954, and addressed to Herald American Group, 218 E. Magnolia Street, Compton, California.

Now, if you wish to read, you can start with the word, [528] "Gentlemen."

Mr. Grodsky: May I suggest, in the interest of saving time that the letter can be given to the reporter to insert at this time. Is that satisfactory to you?

Mr. Kaufman: Yes.

Trial Examiner: All right.

"Gentlemen:

"We're off to another advertising year here on Norway sardines. I can see from the schedule that it is a bigger and better campaign than we had during 1953. The program runs, roughly, from the 11th of February, with a slight let-up after Lent, and continues from May through the end of 1954.

"Naturally, we, as distributors of King Oscar Sardines, Crown Sardines and Congress Sardines, want to see this program prove successful. To obtain this success, the retailer must be made to realize the potential existing in King Oscar, Crown and

(Testimony of C. S. Smith.)

Congress Sardines. I think it is worth pointing out to them that last year, through the efforts of this campaign, there was an increase of approximately 25% in the consumption of Norway Sardines.

"How did this increase in consumption come about? We feel that the increase came about because of the extra effort your contact men gave on behalf of these sardines. We know that you and your staff have pointed out to the retailer the extra benefits that can be obtained from imported sardines, and [529] the retailer reciprocated by building stacks and tying in with the ads running in your newspapers.

"We are again going to ask that you exert every effort in promoting Norway sardines. I am sure that you will find one of the brands that we distribute—that is King Oscar, Crown or Congress—in practically every store your men will be calling on, thereby making your job a little easier. Yours very truly, Bessemyer-Ridnour Company, By /s/ Frank Beesemyer."

Q. (By Mr. Kaufman): Now, Mr. Smith, did you in your capacity as management, ever order any one employed by the Herald American to fire any employee for union activities?

A. I did not. [530]

* * *

Q. (By Mr. Kaufman): You had examined a profit and loss statement? A. I did.

Q. And as a result of that examination you ar-

(Testimony of C. S. Smith.)

rived at a conclusion? A. Yes.

Q. What was that conclusion?

A. That we were going to lay off a number of people, cut expenses, less wages in some cases and try to get more efficiency out of the organization.

Q. Now, there is an allegation in the complaint that Raymond J. Ross was fired on or about August 17th for engaging in concerted activities with other employees for the purposes of collective bargaining, et cetera.

In other words, I assume for the purpose of my questions, and I will state it briefly, it states that Mr. Ross was fired for union activities.

Is that a fair statement?

Mr. Grodsky: Yes.

Q. (By Mr. Kaufman): At the time that Mr. Ross was fired on or about August 17th, 1954, did you know he was engaged in [534] union activities?

A. I did not.

Q. At the time that Gloria Hickey and Doris Farley were fired on or about August 18th, 1954, did you know they were engaged in union activities? A. I did not.

Q. Had that been called to your attention by any one in your organization?

A. It had not been.

Q. Mr. Smith, did you give any instructions to have any of your employees questioned as to whether or not they belonged to the union or were engaged in union activities?

A. I did not at any time, no.

(Testimony of C. S. Smith.)

Q. Did you ever tell Mr. Lugoff that he was to discharge an entire department if he could not determine who was responsible for the organizing drive?

A. I definitely did not. I did not discuss the matter with Mr. Lugoff at all. [535]

* * *

Q. (By Mr. Kaufman): Did you ever say to Mr. Sheets by telephone call or by person or at any time, something to the effect that you had learned of a movement to organize a Guild in the Herald American and that you would rather close the papers down than sign up with the Guild?

A. No such conversation ever occurred. It would have been ridiculous on my part to make any statement at all to Mr. Sheets. It did not concern his department. [536]

* * *

Direct Examination
(Continued)

Mr. Kaufman: Gentlemen, if I am a tiny bit repetitious, it will only be for the matter of a second or two. Sometimes I forget where I left off.

By Mr. Kaufman:

Q. Mr. Smith, at any time did you know or have any knowledge that any one was discharged for union activities? A. Never at any time.

Q. Did you know, if it is such a fact, that any of your employees were questioned about union activities?

(Testimony of C. S. Smith.)

A. No, never at any time and I have never heard of any such thing if it happened.

Q. Did you order Mr. Murray or any one else to attempt a surveillance of any union activities?

A. I did not.

Q. Now, Mr. Smith, by an exhibit of General Counsel, I believe that an advertisement was introduced into evidence as to an advertisement in an issue of October 21st for some type of girl. [542] Are you familiar with that advertisement?

A. Yes, I am.

Q. And what was the purpose of that?

A. A girl quit in the office and we had to replace her.

Q. Now, in Mr. London's conversation with you after he had been discharged, did he tell you that he was discharged for union activities and furthermore, at any time, did he ever ask you whether or not that was the cause of his discharge?

A. No, sir, unions were not mentioned at any part of the conversation.

Q. Did you ever raise employees' wages to combat unionism or were the wages raised of any member of your department to combat unionism?

A. No.

Q. Now, besides your newspapers, you have other enterprises, do you not? A. Yes, I do.

Q. Are there unions in your paper?

A. There have been since 1941. [543]

* * *

(Testimony of C. S. Smith.)

Cross-Examination

By Mr. Grodsky:

Q. I show you General Counsel's Exhibit No. 6, Mr. Smith, which was furnished in response to a subpoena and under item No. 9 which calls for a list of all employees terminated after August 1, 1954, that is all classified advertising solicitors.

Under that heading does there appear the name of any other employee except Gloria Hickey?

A. That is the only one I see.

Q. Do you know the name of the other employee who you just testified quit?

A. You mean at one time in the Lakewood office?

Mr. Kaufman: I submit that this is an unfair question and confusing to me.

Mr. Grodsky: All right.

Mr. Kaufman: Just a moment. Are you referring now to the October 21st advertisement girl? [545]

Mr. Grodsky: Yes.

The Witness: I can answer that.

Trial Examiner: Excuse me, sir, perhaps you can and perhaps you cannot, but there is one question now and that is the name of the girl who quit, and according to your testimony, for whom that advertisement was inserted.

(Testimony of C. S. Smith.)

The Witness: But the question carried a string to it so that there would be no answer.

Trial Examiner: Mr. Smith, I will take care of that part of it if you will just answer the question.

The Witness: Well, my answer is that no classified ad girl quit.

Trial Examiner: All right, that is an answer.

What was the name of the girl who quit, whether she was a classified ad girl or otherwise?

The Witness: The girl's name was Marion. I forget her last name.

Trial Examiner: Her first name was "Marion"?

The Witness: Right.

Trial Examiner: All right. I am going to strike all of the witness' answer to that question, except the name "Marion." Go ahead, sir.

Q. (By Mr. Grodsky): Now, Mr. Smith, what is your attitude towards the Newspaper Guild?

A. I don't know anything about them. [546]

Mr. Kaufman: Now, just a moment. It seems to me that this isn't proper examination in view of the fact that I was precluded—just so that we have a record of it—I am just wondering why General Counsel did not object when I tried to get into that phase myself.

Trial Examiner: There was some difficulty with the question, but you did explore his attitude towards the union but not in such terms.

However, the question has been answered and I will let it stand.

Q. (By Mr. Grodsky): You have known of the

(Testimony of C. S. Smith.)

Newspaper Guild as a union of newspaper employees for some years, haven't you?

A. I did not know what it covered. There are thousands of unions and I have not followed this particular deal.

Q. I do not mean that you know in detail all of its principles and policies, but you knew it existed?

A. I have heard the name "Guild" but I didn't know what employees it covered.

Q. You have heard the name "Guild" for a number of years, haven't you?

A. I cannot say I have. It has not meant anything to me.

Q. When is the first time that you can recall, from which you are certain that you knew that a Newspaper Guild existed?

A. When I started getting——

Mr. Kaufman: I think this is going much too far afield [547] and it is irrelevant, immaterial and incompetent, and not proper examination.

Trial Examiner: I will take some area of his testimony and I will overrule the objection. Go ahead, sir.

The Witness: The first time I started to pay any attention to it was after this case was filed and I started getting dirty sheets through the mail signed by the Newspaper Guild, the biggest bunch of liars I have heard of. It would do justice to a five-year-old child's intelligence, the stuff they were sending out.

(Testimony of C. S. Smith.)

Q. (By Mr. Grodsky): And that is the first time that you had any direct personal contact with them?

A. That is the first time that I started to pay any attention to them or even find out what it was. [548]

* * *

Q. (By Mr. Grodsky): Yesterday there was read into the record a letter about the sardine advertisement—— A. Yes.

Q. The writer of the letter was soliciting for you to run newspaper articles in your news columns which would relate to Norwegian sardines?

Am I correct in that general summation?

Mr. Kaufman: I don't know, but Mr. Smith would know.

The Witness: I have the letter. You can see what it says.

Mr. Grodsky: Oh, fine.

Q. (By Mr. Grodsky): Calling your attention to the last paragraph which says in the first sentence: "We are again going to ask that you exert every effort in promoting Norway sardines."

In your knowledge, as the publisher of a paper, what type of promotion were they soliciting from you?

A. It says: "in practically every store your men will be calling on, thereby making your job a little easier."

When we get an advertisement for a product, we will send [550] what we call "fliers" to every ac-

(Testimony of C. S. Smith.)

count which handles that article or a similar article, calling their attention to the advertising campaign in the Herald American. Now, every newspaper does that, and that is what this goes to and in this particular case, I imagine that the "fliers" were sent to these people, because they are thanking us for it.

Q. Do you run recipes in which you specify the ingredients as "Norway sardines"?

A. I don't think so.

Trial Examiner: Am I supposed to take from that that Norwegian sardines move in interstate commerce?

Mr. Grodsky: No, this line of questioning is preliminary. This whole line is preliminary.

Mr. Kaufman: It covers a multitude.

Trial Examiner: Right.

Q. (By Mr. Grodsky): I take it there have been times in the past, to your knowledge, where you have run recipes specifying the ingredients as Norwegian sardines?

A. Never at any time that I know of on Norway sardines.

Q. Did you ever run recipes in which you specifically mentioned a trade-mark product, which was being advertised in your newspaper?

A. I don't know of any. [551]

* * *

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 17 and was received in evidence.)

(Testimony of C. S. Smith.)

GENERAL COUNSEL'S EXHIBIT 17

[Letterhead]

Beesemyer-Ridnour Company
Food Brokers—Manufacturers' Representatives
203-206 Metropolitan Warehouse
1340 East Sixth Street
Los Angeles 21, California

February 5, 1954.

Herald American Group
218 E. Magnolia St.
Compton, California

Gentlemen:

We're off to another advertising year here on Norway sardines. I can see from the schedule that it is a bigger and better campaign than we had during 1953. The program runs, roughly, from the 11th of February, with a slight let-up after Lent, and continues from May through the end of 1954.

Naturally, we, as distributors of King Oscar Sardines, Crown Sardines and Congress Sardines, want to see this program prove successful. To obtain this success, the retailer must be made to realize the potential existing in King Oscar, Crown and Congress Sardines. I think it is worth pointing out to them that last year, through the efforts of this cam-

(Testimony of C. S. Smith.)

paign, there was an increase of approximately 25% in the consumption of Norway Sardines.

How did this increase in consumption come about? We feel that the increase came about because of the extra effort your contact men gave on behalf of these sardines. We know that you and your staff have pointed out to the retailer the extra benefits that can be obtained from imported sardines, and the retailer reciprocated by building stacks and tying in with the ads running in your newspapers.

We are again going to ask that you exert every effort in promoting Norway sardines. I am sure that you will find one of the brands that we distribute—that is King Oscar, Crown or Congress—in practically every store your men will be calling on, thereby making your job a little easier.

Yours very truly,

BEESEMYER-RIDNOUR COMPANY,

By /s/ FRANK,

FRANK BEESEMYER.

Received in evidence December 10, 1954.

Q. (By Mr. Grodsky): Mr. Smith, during the period of time that you have been managing editor, the actual operating top man in the company, the general manager I believe is your title, since

(Testimony of C. S. Smith.)

September 1st, do you know whether or not you have received news stories in connection with the new automobile models which have come out since that time?

A. Well, now, I have been referred to as "the general manager," "the top man" and "the managing editor." I would like to get it straight before I answer this.

Q. You know what your position is.

A. Well, but I have to give a truthful answer and you have given me three different job titles.

Mr. Grodsky: I will withdraw the question.

Q. (By Mr. Grodsky): Have you received any news stories with [556] reference to the new automobile models?

A. Have I? No, never at any time.

Trial Examiner: Well, to your knowledge, has the paper that you publish?

The Witness: We have had some stories but where they come from, I don't know.

Trial Examiner: Let us have the question so that we will make sure.

(Question read.)

The Witness: I canot recall to mind any single story. There may have been some but I have not looked for them or have paid any attention to them.

Q. (By Mr. Grodsky): Do you know whether it is the practice or the custom for your newspaper to get such news stories? A. From whom?

Q. About new models? A. From whom?

(Testimony of C. S. Smith.)

Q. My first question is, do you know if you get such stories?

A. Everything that appears in the newspaper we get from somewhere, Mr. Grodsky.

Trial Examiner: That hardly answers the question. The question is whether you get such stories.

The Witness: From whom?

Trial Examiner: That still doesn't answer the question.

The Witness: Well, what stories? [557]

Trial Examiner: I think it was perfectly obvious what Mr. Grodsky wanted, but if you have any doubt, I will ask him to rephrase the question.

* * *

Mr. Grodsky: I will have this marked as General Counsel's Exhibit No. 18 for identification.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 18 for identification.)

Q. (By Mr. Grodsky): Mr. Smith, I show you General Counsel's Exhibit No. 18 for identification, being page 29 from the Compton-Lynwood edition of the Herald American for Thursday, December 2, 1954, and ask you whether on that page there is a big editorial head, " '55 Mercury on Display at George Moyer's"? A. There is.

Q. And is there an article under that relating to the Mercury in general terms?

Trial Examiner: I suggest, Mr. Grodsky, that in the interests of saving time, you have had it

(Testimony of C. S. Smith.)

marked for identification, and it speaks for itself. Offer it and I will pass on it.

Mr. Grodsky: All right, I will offer this document in evidence. [558]

Mr. Kaufman: Just one moment. It is dated Thursday, December 2, 1954, and it throws no light on the accusations made——

Trial Examiner: I will receive the document.

(The document heretofore marked General Counsel's Exhibit No. 18 for identification, was received in evidence.)

Q. (By Mr. Grodsky): Do you know where the pictures of the two automobiles which appear on that page came from?

Mr. Kaufman: I object to that as being outside the scope of the direct examination and improper cross-examination. The subject wasn't covered by me.

Mr. Grodsky: May I be heard?

Trial Examiner: Yes.

Mr. Grodsky: Well, he brought in this Norway sardines thing.

Trial Examiner: Go ahead, I will overrule the objection.

The Witness: No, sir, I did not.

Q. (By Mr. Grodsky): It did not come over your desk? A. No, it did not.

Q. There are other articles on that page, one of which relates to the Lincoln, "1955 Lincoln at G. Moyer Showroom"; do you know where that advertisement originated?

(Testimony of C. S. Smith.)

A. I haven't the slightest idea.

Q. Do you know from what source your publishing company received [559] the article?

A. I do not.

Q. Do you know from what source, if there was a source, your company generally receive articles of this sort? A. I do not.

Q. Do you know whether or not they come to you as complete articles? A. No, I do not.

Q. In your organization who would know that?

A. I don't know.

Trial Examiner: Mr. Grodsky, let me ask you a question. There has been a witness in this proceeding who testified that advertisements for automobile models are placed by national advertising agencies so-called, or advertising agencies. I should not use the term "national."

Mr. Grodsky: That is right.

Trial Examiner: I believe his testimony was that the mats are also provided.

Mr. Grodsky: Yes, sir.

Trial Examiner: Now, is it your contention that this constitutes, because of the product that is advertised, irrespective of the source, that this constitutes so-called national advertising which facilitates the flow of goods in interstate commerce?

Mr. Grodsky: In part, yes. [560]

In part, the national advertising. I think the Board should be enlightened that national advertising could also include ancillary services, which

(Testimony of C. S. Smith.)

do not appear only as advertisements, namely, mats as well, and I know for a fact that such news mats are furnished.

Trial Examiner: By the advertiser?

Mr. Grodsky: By the advertising agency. I can take a stipulation to that effect or if not, I am entitled to get that in evidence.

Trial Examiner: Well, I think we can also belabor something too much. My feeling here, with respect to that kind of thing, is that the issue depends on the nature of the product rather than on the source of the advertisement which makes for jurisdiction. I think that is the issue.

Mr. Grodsky: Yes.

Trial Examiner: And I am just wondering if it isn't being overproved by you, but go ahead.

Mr. Grodsky: I understand your position, Mr. Examiner. I also sympathize with counsel's possible impatience but I think I am entitled to make my record.

Trial Examiner: Go ahead, sir.

Q. (By Grodsky): Who, in your organization, would know where these news items come from?

A. I haven't the slightest idea. I have one hundred and [561] eighty people in the organization.

Q. They are not all responsible for putting out the newspaper, are they?

A. Each one has his job.

Q. Would Mr. Brewer be the man who is responsible for putting in those news items in the paper? A. Not on December 2nd, no, sir.

(Testimony of C. S. Smith.)

Q. Would Mr. Butler be the man who is responsible for putting in those news items in the paper?

A. That, sir, I cannot answer. If it was run as news, he would be; if it was run as help to advertisers, he would not. This could be either one from the looks of it.

Q. Who is responsible for items which appear to be news but which are run as "help to advertisers"?

A. That would depend upon the salesman on the territory to see—well, this is a personal deal of George M. Moyer and he is the man who is billed for it. The copy was presumably picked up from George M. Moyer. I haven't the slightest idea which salesman calls on George M. Moyer.

Q. It would be one of your display advertising salesmen? A. Possibly.

Q. That would be someone who works under the supervision of Mr. Hartwell?

A. No, because Mr. Hartwell wasn't classified advertising manager on December 2nd, 1954. [562]

Q. Under whose supervision would the display advertising salesman be?

A. That would depend on who he is.

Mr. Kaufman: We are going right around in a circle so I must object. The advertisement speaks very clearly for itself.

Mr. Grodsky: We are not talking about an ad.

Mr. Kaufman: The article alongside it speaks for itself. This witness is giving you the information he knows.

Mr. Grodsky: There is also an article on the

(Testimony of C. S. Smith.)

same page concerning General Motors and I am going to get to that next.

Mr. Kaufman: You have your exhibit right on the record and it speaks for itself.

Mr. Grodsky: I know, but I want to get to the bottom of this and I think the Board wants to, too. That is the only reason I want to.

Mr. Kaufman: The bottom of what?

Mr. Grodsky: Where they came from. Is there a pending question?

Mr. Kaufman: Yes, I have objected to your question and I am waiting for a ruling.

Trial Examiner: I was looking at the paper.

Mr. Kaufman: In order to make a ruling, sir, I thought?

Trial Examiner: Yes, I am looking for something that can enlighten me as to how much this speaks for itself, so that we can avoid this detail. [563] I am going to overrule the objection.

The Witness: What is the question?

Trial Examiner: I will have it read for you.

Mr. Grodsky: All right.

(Question read.)

Mr. Grodsky: I will withdraw the question because I have no one—I have no way of clearing it up.

Q. (By Mr. Grodsky): Did you have any person in your editorial department who is known as an auto editor? A. No, sir, we do not.

Q. Do you have any single person who regularly

(Testimony of C. S. Smith.)

handles auto news items? A. No, sir.

Q. Well, then, I come back to my question of who are the supervisors of your display advertising? A. In what zone, Mr. Grodsky?

Q. In the zone in which Mr. Moyer appears?

A. That I cannot answer, I don't know.

Q. Who, in your organization, does know?

A. I would have to make some inquiries to find out. [564]

* * *

Q. (By Trial Examiner): Excuse me. Mr. Smith, referring to General Counsel's Exhibit No. 18, can you tell me, please, whether by looking at the advertisement bearing the legend "Bendix" or relating to a Bendix, and bearing the name "Atlantic TV Sales," can you tell by looking at that, who placed the advertisement?

A. The Atlantic TV Sales. I happen to know about that particular account.

Q. Do you know from your knowledge of the account, who supplied the information which is the basis for the insert here, "Bendix Home Appliances, Div. AVCO Manufacturing Corp., Cincinnati 25, Ohio"?

A. No, sir, I cannot. We received the entire advertisement [565] from Atlantic TV Sales.

Q. That is the write-up and everything else?

A. Yes. It was probably sent by some other newspaper and the mat was given to us. As you can see, sir, the type on this is the same as the type on that (indicating).

(Testimony of C. S. Smith.)

Trial Examiner: The witness compares the type in the term "Bendix" with the type in "Atlantic Sales TV."

Mr. Grodsky: I would like to have this sheet from a newspaper marked General Counsel's Exhibit No. 19 for identification.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 19 for identification.)

Q. (By Mr. Grodsky): I show you General Counsel's Exhibit No. 19 for identification and ask you if that is a copy of a page of the Compton-Lynwood Herald American edition for Thursday, December 2nd, 1954?

A. This is one of the inserts for the Compton and Lynwood section.

Q. Now, in the upper left-hand corner of the paper, which I have had marked General Counsel's Exhibit No. 19 for identification, is a title "Guide to Good Shopping by Pamela Morrison"; do you see that article? A. I do.

Q. And at the bottom of the article does this language appear: "Damar Products, Inc., 75 Damar Building, Newark, N. J."? [556]

Mr. Kaufman: Now, just a minute. I am going to object to that. He has already introduced it into evidence or for identification and the document speaks for itself.

Mr. Grodsky: I offer the document in evidence.

Mr. Kaufman: I object to it on the grounds

(Testimony of C. S. Smith.)

that it is dated December 2, 1954, and there is no showing that it is a typical newspaper. Also, it happened after the occurrences and it dates back almost a year after the date of the charge.

Trial Examiner: I will receive it.

(The document heretofore marked General Counsel's Exhibit No. 19 for identification, was received in evidence.)

Q. (By Mr. Grodsky): I will ask you, is Pamela Morrison a member of your staff? Is she on your payroll as an employee?

A. I don't recognize the name.

Q. Do you know where that article came from?

A. No, sir, I don't.

Q. Will you examine the article and see whether it advertises items from Damar Products, Inc., 75 Damar Building, Newark, New Jersey?

Mr. Kaufman: Now, just a minute. The same objection, as it speaks for itself.

Trial Examiner: Is this a preliminary question leading up to something else?

Mr. Grodsky: Yes.

Trial Examiner: I will overrule the objection. [567]

The Witness: That is only on one of the parts that name Damar Products, Inc., 75 Damar Building, Newark, New Jersey.

Q. (By Mr. Grodsky): Do you have any business with that company?

(Testimony of C. S. Smith.)

A. I don't know. I don't recognize the name and I do not believe we have.

Q. Do you know how it got into a local newspaper in Compton?

A. I don't know. I haven't the slightest idea.

Q. Who, in your organization, would know?

A. I don't know.

Q. You are the top man in the organization?

Trial Examiner: Well, he has already testified to that, Mr. Grodsky. Let us not repeat.

Q. (By Mr. Grodsky): Now, Mr. Smith, you testified in looking at some profit and loss statements, you found that the conditions were very bad, if I recall correctly; is that correct?

A. Over what period?

Q. Well, you testified, I believe, some time before the discharges in August?

A. That is right.

Q. Do you have the profit and loss statements here? A. I do. [568]

* * *

Q. (By Mr. Grodsky): Now, Mr. Smith, when was the first time that you became aware of the fact that your economic condition in the Herald American was deteriorating, was bad?

A. Around March.

Q. And what, if anything, did you do about it at that time?

A. Held a series of meetings with top department heads.

(Testimony of C. S. Smith.)

Q. When was the first meeting held?

A. Some time in March.

Q. Who was present at that first meeting?

A. Various mechanical superintendents and the various department heads. [575]

Q. Specifically, do you remember any names of the people who were present?

Mr. Kaufman: Now, Mr. Grodsky, just a moment. I submit this is improper cross-examination and outside the scope of the direct examination, bringing up issues which might have a slight relevancy, but which are so collateral that we will be weeks going into them.

What was the conversation and who was present there. Well, there might be a slight bit of relevancy there but it is so overweighed by the collateralness of the issues as to come within the purview of a ruling.

Trial Examiner: I think it has a role in this proceeding. The door was opened in direct examination by this witness or you, which I think is beside the point, but he testified to, at least he was concerned about the matter as far back as February.

Go ahead, sir.

Q. (By Mr. Grodsky): Now, at this first meeting which you say took place in March, who was present that you recall, by name?

A. I can give you the names of some of the people that were present at all of the meetings. There may have been one or two absent at each one.

(Testimony of C. S. Smith.)

I can give you the names of the group who were called to the meeting.

Q. Now, I am addressing myself to this first meeting first. [576]

A. I don't remember who was there. I have given you to the best of my ability what the answer was. Now, we had more than fifteen meetings. I kept no minutes on the meetings and as I told you, there would be one or two absent from the meeting, but I can give you the industrial group who attended all or part of the meetings.

Q. What was discussed at the first meeting?

A. What did you say?

Q. What was discussed at the first meeting?

A. The fact that we were losing money at this time and losing considerable money.

Q. And did you ask for any action from anybody at that meeting? A. Did I what?

Q. Did you ask for any action from anybody at that meeting? A. Why, I certainly did.

Q. Whom did you ask to do what?

A. I asked each department head to cut down as much as they could.

Trial Examiner: Cut down on what?

The Witness: Expenses. We discussed more efficiency in the job. We discussed the salesmen getting their copy in earlier. We discussed the possibility of trying to get additional business. We discussed the possibility of trying to raise rates. [577]

Q. (By Trial Examiner): Did you instruct the

(Testimony of C. S. Smith.)

people at the meeting to cut expenses by cutting staff?

A. Not until the July or August meeting, when we had tried everything else and had been unable to effect the economies that we wanted. And at that time, I lowered the boom and told them to get rid of one or two people in every department.

And in the mechanical end, which is a large part of it and over which we have no control because if the press needs twelve men, it needs twelve men according to union contract and they stay there until they finish, and we asked the superintendent and all others, to shorten the hours as much as they could.

We put on an extra maintenance man to stop breakdowns at that time and we did everything that we could to try to promote efficiency.

Q. Going back to any meeting which was held in February or March, 1954, was there any discussion about getting people and paying them more money and cutting staff or pays?

A. It wasn't at the general meeting, no. There was a private meeting with Mr. Butler and Mr. Brewer and myself afterwards.

Q. This was when?

A. What did you say?

Q. This was when?

A. Some time in March or April, we had a number of meetings, [578] your Honor.

Q. And what, if anything, did you tell them then?

(Testimony of C. S. Smith.)

A. I told them that I thought the news department was overstaffed. At that time sometimes we were putting in as much as forty-five per cent news matter, and I wanted it cut down to twenty-five per cent, which meant a lot less work for the news staff.

Q. Was it at this meeting you told them to hire better people and pay increased salaries?

A. I never told them to hire better people. I told them I wasn't satisfied with the salary schedule in the editorial department.

Q. May we go back to the first meeting which you had with Mr. Butler and the other gentlemen; what did you tell them then about that?

A. I think that was exclusively on cutting down the amount of news in each paper and also that I wanted better reportorial work and better front pages.

Q. When was the first time that you proposed or suggested or instructed——

A. I don't hear you.

Q. When was the first time that you proposed, suggested or instructed any of your staff to pay higher wages?

Mr. Kaufman: Now, your Honor, may I object. You said "proposed or instructed," so may I ask you to break that down? [579] It is slightly compound.

Trial Examiner: I certainly will.

Q. (By Trial Examiner): When did you first propose it? A. Nearly two years ago.

(Testimony of C. S. Smith.)

Q. To whom?

A. Mr. Butler and I talked it over with Mr. Brewer a number of times and in March I took a more active interest, and when I looked over the salary schedules and the profit and loss statements, in July and August especially——

Q. Do not tell us what the statements contained now. A. What did you say?

Q. Do not tell us what the statements contained.

A. All right. When I looked over the statements, I immediately called a meeting and told them that something had to be done at once, that Mr. Brewer wasn't well and was going on an extended vacation, and that I was taking over.

And I said the first thing that I was going to insist upon was that there be an immediate cut in payroll and there were some nine to eleven people laid off.

Q. When did you first propose that the wages be increased—I realize you said two years ago—do I understand that no increases were given as a result of your first proposal?

A. There were some wage increases in the whole organization. I am not too familiar with it because there were a lot of people, but I felt, and still feel, that the wages in the [580] editorial department had lagged behind the others.

Q. When did you first tell your staff that, or any member of your staff?

A. I think Mr. Brewer and I talked it over for

(Testimony of C. S. Smith.)

some time and in March, it was brought up rather forcibly.

Q. Did you bring it up? A. Yes.

Q. What did you tell him at that time?

A. I said I did not want people, as he said yesterday, I didn't want cheap people, that I would rather have one high priced man than three cheap ones, but I still wasn't engaged actively in handling the paper and I didn't want to step in and take over arbitrarily which I did do in July and August.

Q. Well, did Mr. Brewer and Mr. Butler say they would not act on your proposal?

A. No, Mr. Butler said he thought we were paying more than other newspapers in the neighborhood at that time and I brought it up in July or August and insisted on a survey so when I saw these reports, I wasn't satisfied.

Q. What were the results of that survey as shown to you?

A. That they were either paying about the same prices that we were or less.

Q. This was in June or July?

A. June or July of 1954, yes.

Trial Examiner: Go ahead, Mr. Grodsky. [581]

The Witness: And I might say that the salaries in the editorial department had lagged away behind salaries in other departments.

Trial Examiner: Well, I think you have answered my question.

Go ahead, Mr. Grodsky.

(Testimony of C. S. Smith.)

Q. (By Mr. Grodsky): Now, who was directed —strike that. Did you direct the discharge of Doris Farley?

A. I don't know. I had nothing to do with the individual people who were laid off.

Q. Doris Farley was a PBX operator, just to refresh your recollection, a cashier and PBX operator.

A. That is what I heard in the proceedings.

Q. Who was her immediate supervisor?

A. I don't think she would come under—I imagine she was under Mr. Brewer. I cannot be sure on that though.

Q. Did you discuss with Mr. Brewer the necessity of him laying off people on his staff?

A. I discussed with all of them the absolute necessity and gave them a total to work out and get rid of them.

Q. When did that discussion take place?

A. Some time in August.

Q. And who was present at that discussion?

A. Practically every department head.

Q. Will you tell us now by name, whom you remember was [582] present at that meeting?

A. Joe Margan, I think was there.

Q. Will you tell us of what department he was head?

A. Press foreman. A chap named "Scotty" who is the head of the Mailer's Union there. He was present. There was a man representing the stereo-

(Testimony of C. S. Smith.)

typing department, the head of it. I have forgotten his name.

There were one or two men there from the machine operating and the compositors.

Q. Do you remember their names?

A. I don't. I think Mr. Brewer was there and Mr. Butler.

Q. Right.

A. And I think Mr. Murray was there.

Q. Right. Anybody else?

A. I think Mr. Huber was there. Now, I cannot testify that all of these men were at this particular meeting, but I can testify that this was the group that I always called to attend these meetings and there were usually one or two absent.

Trial Examiner: Which can you state were there with certainty?

The Witness: I cannot state as to any of them, with the exception of Mr. Butler and Mr. Brewer.

Q. (By Trial Examiner): Well, you can state with certainty that Messrs. Brewer and Butler were there?

A. That is correct and at least eight or ten others. [583]

Q. By name, can you state with certainty, anybody else?

A. No, I have given the list here that we always requested to come out. Now, as to which ones were off that day and sleeping, I cannot answer.

Q. My question still is with respect to anybody

(Testimony of C. S. Smith.)

else but Mr. Butler and Mr. Brewer. Can you state by name with certainty, who was there?

A. I cannot. I have given it just the best I can.

Trial Examiner: All right. That answers my question. Go ahead.

Q. (By Mr. Grodsky): Now, this meeting took place before the discharges which took place on August 17th and 18th? A. That is right.

Q. How long before the discharges did this meeting take place? A. One to two days.

Q. Now, the 16th is a Monday, the 17th is a Tuesday. With that in mind, would you be able to tell us what day of the week that meeting took place?

A. It was either the Friday of the previous week or it was the Monday of that week. I cannot tell you which.

Q. And what did you instruct the people present to do? A. To lay off some help.

Q. Did you tell anybody specifically to lay off anybody?

A. I told them that we would have to have ten to twelve people [584] laid off.

Q. Did you say in what departments the people were to be laid off?

A. I told them to get together themselves and decide on which ten to twelve people had to go because the payroll was top heavy.

Q. (By Trial Examiner): Would you look at this 1954 calendar, Mr. Smith, please, and go down to August, particularly, and would you see if the

(Testimony of C. S. Smith.)

calendar refreshes your memory as to the day of the week or the date when this meeting was held, at which you say Mr. Butler and Mr. Brewer were present and some other department heads?

A. There were some three to five meetings at my house every Monday. It is either Friday or Monday. I have other meetings with various enterprises on various matters.

Q. I take it that you don't want to look at the calendar to refresh your memory?

A. I did. Friday 13th and the other dates are the 16th and 17th, Monday and Tuesday, and there was a peremptory cutback right away.

Q. My question was whether or not the calendar would refresh your recollection, and if you could give me the date and not whether there was a peremptory cutback.

Q. (By Mr. Grodsky): Mr. Smith, at the time of the cutback, did any of the executives complain that it would decrease the efficiency of their operations? [585]

A. I don't think so. I don't remember.

Q. Did any of them say that they would not be able to operate with the cutdown in help?

A. No, sir, they did not.

Q. Did any of them at any time after, did they ask you for permission to hire new help?

A. I don't remember any such thing.

Q. Would they have to have permission from you to hire additional help after the cutback?

A. Not until last week. They had orders at the

(Testimony of C. S. Smith.)

time not to hire any more, but last week I put in a different rule, which is that employees to be hired or fired, it must go over my desk.

Q. When you say that "they had orders not to hire any more," do you mean by that that they had orders not to hire any additional help or any help to substitute for those who were being let go?

A. That is correct.

Q. Well, I asked it two ways; which is correct?

A. Well, you ask me one way and I will tell you which is correct.

Q. Did you instruct them that they did not have authority to hire help to take the place of those who were being let go?

A. They were definitely instructed as to that.

Q. Did anybody ask you for authority to hire another PBX [586] operator?

A. No, sir, not that I remember. In fact, I didn't know a PBX operator had been let go until these proceedings started. I wasn't interested in who the people were. I was interested in getting ten to twelve people off the payroll. It was top heavy.

Q. Do you know who directed the discharge of Gloria Hickey?

A. I heard Mr. Lugoff did in the courtroom. I heard him say he had discharged her.

Q. Well, you may also have heard Mr. Lugoff say that he had received the orders from somebody else, other than you. Now, may I inquire from you, do you know who directed the discharge of Gloria Hickey?

(Testimony of C. S. Smith.)

A. Mr. Lugoff himself. He said he was the one solely responsible for picking her and he so testified here in this courtroom.

Q. (By Trial Examiner): Were ten or twelve people let go during that week? A. Sir?

Q. Were ten or twelve people let go during that week?

A. That is my recollection. It was from nine to twelve.

Q. During the week beginning August 16th, I believe?

A. That is when the discharges started and I think they were all consummated in that week. I would have to check the records to make sure but the orders were very plain and explicit. [587]

Q. What I am trying to find out is not what the orders were but if ten or twelve people were laid off during that week in fact.

A. As far as I know that was done. There was nothing brought to my attention that my orders were not followed out.

Q. Well, can you tell me with certainty then, that there were ten or twelve people, of your own knowledge?

A. I have answered the question to the best of my ability. I can give you no further light on the matter.

Trial Examiner: Well, I don't understand your answer.

The Witness: Maybe if the reporter would read it to you, it would clarify it.

(Testimony of C. S. Smith.)

Q. (By Trial Examiner): Well, I will ask you then, in order to save time, whether you know of your own knowledge, in truth or in fact, that ten or twelve people were laid off that week?

A. I can only answer that by saying I presume they were because I did not follow it up and it wasn't called to my attention that my orders had not been followed.

Trial Examiner: All right.

Mr. Kaufman: If you want to, your Honor, you can have Mr. Brewer testify as to that point as he knows.

Trial Examiner: Well, I have asked this witness and I [588] have his answer.

Q. (By Mr. Grodsky): At any time after the layoff of Miss Hickey, did Mr. Lugoff ask permission to hire an additional girl?

A. I don't remember of any such incident, except as a replacement.

Q. Did he ask permission to hire a girl as a replacement?

A. To replace the girl who was laid off in the Lakewood office and the classified ad girl there was to have been transferred as society editress.

Q. Did Mr. Butler ever ask you for authorization to increase his staff?

A. Authorization to what?

Q. To increase his staff?

A. Not that I remember.

Q. Did he ever—strike that. Did Mr. Butler ask your permission to hire Earl Griswold?

(Testimony of C. S. Smith.)

A. No, sir, he did not. I hired him myself.

Q. Did you check with Mr. Butler as to whether he needed an additional man?

A. Mr. Butler was out of town and I took it into my own hands. The man who was handling the editorial work at Long Beach wasn't satisfactory. We transferred him and transferred the man from Lakewood to Long Beach, and Earl Griswold who was editor of a competing paper there for twelve years, was [589] thoroughly familiar with the job and I was glad to get him. And he is doing a grand job.

Q. In view of the fact that you have Mr. Griswold on your payroll, do you now have an additional man in the editorial department?

A. No, I do not have. It is the same number.

Trial Examiner: The same number as when?

The Witness: After the cutback. In fact, I think there is still one less because a society editress has been let go since then, and not replaced.

Trial Examiner: You mean Maxine Galt?

The Witness: Who?

Trial Examiner: Maxine Galt?

The Witness: Maxine Galt was discharged not only for cause but so that the girl who had been with us fifteen years would have a place, but there has been no addition in numbers.

Q. (By Mr. Grodsky): Mrs. Galt has—strike that. Mrs. Galt was replaced by Helen Farlow?

A. Yes. [590]

* * *

RALPH J. BREWER

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Kaufman:

Q. In regard to the use of telephones for a person's own business during the time you were running the organization, do you have any recollection pertaining to that?

A. A general rule has been in effect for many years which had come out and had gone out by notices to all offices that [591] personal calls were to be reported to the operator and paid for.

Q. Did you ever collect any money from the staff for personal calls, from Mr. London?

A. Not to my knowledge.

Q. Do you know who fired Mrs. Farley?

A. I selected her as being laid off.

Q. Was any union activity on her part the cause of your firing her? A. No.

Q. Or any other employee? A. No.

Q. Did you have any idea that she was interested in the Guild at the time she was selected?

A. I did not.

Q. Actually she was very junior in time of service?

Mr. Grodsky: I object to that. It is leading.

Trial Examiner: Yes.

(Testimony of Ralph J. Brewer.)

Q. (By Mr. Kaufman): What was your reason, please, for her discharge?

A. My reason for selecting her was that she was the youngest member on the switchboard.

Q. During the time there was this cutback in the middle of August, do you know approximately how many employees were fired? [592]

A. I know of at least eight or nine in the front office on that particular definite cutback.

Mr. Kaufman: That is all.

Cross-Examination

By Mr. Grodsky:

Q. Do you know the names of these employees?

A. I will try to give them to you.

Q. And the departments or their jobs, please.

A. I will see if I can remember them. Gloria Hickey in classified; Doris Farley, cashier and PBX operator; Ray Ross, in editorial; William Edmond, in editorial; Edwina Laurence, I believe that is her first name and I am sure her last name is Laurence; Mabel Harris, messenger; Ted Chargil, display advertising; how many is that?

Mr. Kaufman: Seven.

The Witness: And Marsha Bateman in editorial. That was a part-time, incidentally.

Trial Examiner: In that connection, I don't see her name listed here, on General Counsel's Exhibit No. 6.

The Witness: She may have been a part-time

(Testimony of Ralph J. Brewer.)

employee. She worked after school and perhaps she wasn't even listed.

Mr. Kaufman: How about Collins? You did not name him.

The Witness: Oh, Collins was a new man who had just been there for about one week.

Mr. Kaufman: He was let go? [593]

The Witness: Yes.

Trial Examiner: Think a moment now. Is there anybody else?

The Witness: It was a definite cutback.

Mr. Kaufman: No, no, the question is can you remember any of their names?

The Witness: I was trying to see. There were a lot of them in the back shop, but I cannot give you their names.

Trial Examiner: I am interested only in the people that you can quote.

The Witness: I cannot name the ones that were laid off in the back shop.

Trial Examiner: What do you mean by the back shop''?

The Witness: The production end, the mechanical trades.

Trial Examiner: The mechanical trades?

The Witness: Yes.

Trial Examiner: All right, Mr. Grodsky, go ahead.

Q. (By Mr. Grodsky): Do you know what day or date that Edwina Laurence was laid off?

A. It was in the same week, but I couldn't say.

(Testimony of Ralph J. Brewer.)

Trial Examiner: She was what?

The Witness: She was a collector. It didn't show on that report because it wasn't requested on that report.

Mr. Kaufman: 8/18 is the date.

Mr. Grodsky: Well, wait a minute. [594]

Mr. Kaufman: Oh, I am sorry. Strike that. I am too impatient. Strike it, it isn't in there. His answer was the same week.

Q. (By Mr. Grodsky): And what date, if you know, was Mabel Harris laid off?

A. I cannot answer your question by saying that all of those were laid off in the week starting Saturday, August 14th, I can put in that way, from Saturday 14th, within a seven day period.

Trial Examiner: All right.

Q. (By Mr. Grodsky): Now, when were you told that you would have to make these layoffs?

A. They had been under discussion, I think, for many months.

Q. How many discussions had there been?

A. I met with Mr. Smith every day. Department heads met once a week. But the outcome of it was that every department must cut down. To the best of my knowledge that was either on Thursday the 12th or Friday the 13th.

Q. And what specific orders did you receive in that regard?

A. I just answered that, that the orders were to cut down on all departments. Mr. Smith made a flat ultimatum and we were to cut down on all

(Testimony of Ralph J. Brewer.)

departments. I handled the ones over which I had direct supervision.

Q. You heard Mr. Smith's testimony to the effect that he simply laid down an ultimatum stating that he wanted so many [595] employees off the payroll? A. That is right.

Q. Is that the way it happened? A. Yes.

Q. What figure did he use?

A. He wanted at least twelve off the payroll, a minimum of twelve.

Q. And he left it entirely up to you and the others to decide among yourselves how many would go from each department? A. That is true.

Q. Did you have a subsequent meeting among yourselves in which you decided who would go?

A. No.

Q. How did you know whom to let go or lay off or how many to lay off in your department?

A. That was discussed at this meeting as to which departments were going to let so many go.

Q. Then I understand now that at the meeting with Mr. Smith, you specifically discussed how many would be let go in any specific department?

A. Yes, but not individuals. It was just discussed by departments.

Q. How many were to be let go in each department?

A. I cannot answer that. The record speaks for itself, Mr. Grodsky. [596]

* * *

(Testimony of Ralph J. Brewer.)

The Witness: Read the question he asked me, please.

(Question read.)

The Witness: One or more from each department; I will put it that way.

Q. (By Mr. Grodsky): When you left that meeting, did you know specifically how many employees you would have to let go that were under your direct supervision?

A. They were all indirectly under my supervision. I was general manager of the place. I wasn't a department head.

Q. Did you have any employees who were directly under your supervision?

A. Every employee in the place is under my supervision.

Q. When you left that meeting, did you know how many employees Mr. Butler would have to let go by number?

A. At that meeting, no, sir.

Q. Then a quota wasn't assigned to him at that time? A. That is true.

Q. Was there ever a time when a quota was assigned to him?

A. Nothing more than I had to get rid of at least one. [397] That was the order of Mr. Smith in this matter, one or more in each department.

Q. I don't quite understand you, but I will ask you a question and I don't want you to think I am trying to put words into your mouth.

(Testimony of Ralph J. Brewer.)

Is my understanding that after he left the meeting, if Mr. Butler discharged more than one employee, he was acting on his own initiative?

A. He was acting, after he talked to me. I was the supervisor who made up the list on the instructions of Mr. Smith.

Q. And you went over with Mr. Butler, who was to be laid off?

A. When we came down to the various departments, we had so many names, we had to take some off and put some on. It was a matter of cutting down nine to twelve in the personnel.

Q. Mr. Brewer, I asked you a simple question. Was there not a discussion between you and he that the decision was made as to who should be let go in the editorial department? A. No.

Q. Were you at the discussion, if there was a discussion, at which it was determined who would be specifically let go in the editorial department, by name?

Mr. Kaufman: Do you understand the question, Mr. Brewer? If not, the reporter will read it to you.

The Witness: I understand the question. Certainly I [598] knew the names but I didn't tell him to pick out. We discussed the names but he chose the persons.

Q. Mr. Brewer, possibly I did not make myself clear——

Mr. Kaufman: I think that the question has been asked and answered. It has been asked and answered now clearly.

(Testimony of Ralph J. Brewer.)

Trial Examiner: Please put a question and we will see.

Q. (By Mr. Grodsky): Did Mr. Butler make the decision as to whom he would lay off in the editorial department in the course of a discussion with you and as part of that discussion?

A. That is true.

Q. Now, when did that discussion take place?

A. Immediately after the meeting at Mr. Smith's home.

Q. On the same day?

A. On the same day and the following day.

Q. Now, since you testified that the meeting in Mr. Smith's home was either on a Thursday or a Friday, this discussion could have been either on a Thursday, a Friday or a Saturday?

A. That is true.

Q. Now, when you selected Mrs. Farley for lay-off, the only reason that you selected her is because she was a junior employee in terms of service?

A. That is true.

Q. How soon after she was laid off, did it become necessary to hire another PBX operator?

A. We hired another PBX operator at the Compton Office for [599] one who quit, but I knew from Mrs. Farley's application she could not even come through to handle the Compton board.

Trial Examiner: Well, I am going to strike that testimony. That isn't the present question.

The Witness: May I make one statement here,

(Testimony of Ralph J. Brewer.)

your Honor, either off the record or on, but I would like to justify this statement?

Trial Examiner: This last statement?

The Witness: Yes.

Trial Examiner: I am striking your last answer as it is not responsive.

I am going to ask the reporter to read the question to you and I want you to answer the question and stick strictly to the point.

(Question read.)

Mr. Kaufman: To replace her, do you mean?

Mr. Grodsky: No other.

Trial Examiner: When was the next PBX operator hired?

Mr. Kaufman: No, that wasn't the question.

Mr. Grodsky: I will rephrase the question.

Trial Examiner: All right.

Q. (By Mr. Grodsky): When did you next hire a new PBX operator?

A. May I see General Counsel's Exhibit No. 6?

Q. Yes, certainly. [600]

Mr. Kaufman: It is my understanding that this witness had left his job during September and October.

Mr. Grodsky: This happened in July or August.

Mr. Kaufman: That is fine. I didn't want to get into a question when he wasn't there. She was let go, I believe, on August 18th?

Mr. Grodsky: Yes.

(Testimony of Ralph J. Brewer.)

The Witness: We hired a PBX operator in the Compton office on September 1, 1954.

Q. (By Mr. Grodsky): And just before that date, who was discharged? One girl who was a part-time girl into a full-time PBX operator; is that correct? A. Just before September 1st?

Q. Yes.

A. No, sir, we did that on August 17th.

Q. It says here from part-time to full-time August 30, 1954. A. That is right.

Trial Examiner: Are you referring to Marion Cronk?

The Witness: Yes.

Trial Examiner: What office is that?

The Witness: Miss Cronk was a part-time employee in the Compton office and was made a full-time PBX operator and cashier in the Bellflower office, to replace Miss Farley.

Q. (By Mr. Grodsky): Now, when she was a part-time employee, in what capacity was she an employee? [601]

A. She did clerical work in the display advertising department.

Q. Was she also a messenger part-time?

A. That is part of her duties, yes.

Q. Had she been a part-time PBX operator?

A. She used to work for us as a PBX operator and cashier and our employment records will show that. She is a former employee who came back.

Q. (By Trial Examiner): One point I have in mind. When you discussed with Mr. Butler a list

(Testimony of Ralph J. Brewer.)

of employees to be let go, and then a list was made out, was Gloria Hickey on that list?

A. She was a classified ad department employee.

Q. Was her name on that list?

A. No, she was in another department.

Q. All I wanted to know of you was whether her name was on the list.

A. Not on the editorial list made out with Mr. Butler.

Q. Was she on any list made out with Mr. Butler? A. No.

Q. As far as Mrs. Farley is concerned, do I understand that Marion Cronk filled the same position, and I am not now asking whether she replaced Miss Farley, I am simply asking whether or not she filled the same job that Miss Farley had?

A. She went from part-time to full-time.

Q. Filling the same position? [602]

A. Yes.

* * *

Received December 14, 1954. [603]

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HERALD PUBLISHING COMPANY OF BELLFLOWER,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "Herald Publishing Company of Bellflower and American Newspaper Guild, CIO," Case No. 21-CA-2044 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Herman Marx on December 6, 7, 8, 9 and 10, 1954, together with all exhibits introduced in evidence.

2. Copy of Trial Examiner's Intermediate Report and Recommended Order (annexed to item 4 hereof) and order transferring case to the Board, both issued March 29, 1955, together with affidavit of service and United States Post Office return receipts thereof.

3. Respondent's exceptions to the Intermediate Report and Recommended Order received by the Board on May 3, 1955.

4. Copy of Decision and Order issued by the National Labor Relations Board on September 16, 1955, with Intermediate Report and Recommended Order annexed, together with affidavit of service and United States Post Office return receipts thereof.

5. Respondent's petition for rehearing filed on October 7, 1955.

6. Copy of Board's order denying Respondent's petition for rehearing dated October 20, 1955, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 9th day of March, 1956.

[Seal] NATIONAL LABOR
RELATIONS BOARD,

/s/ FRANK M. KLEILER,
Executive Secretary.

[Endorsed]: No. 15027. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Herald Publishing Company of Bellflower, Respondent, and Herald Publishing Company of Bellflower, Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition for Enforcement of and Petition to Review an Order of the National Labor Relations Board.

Filed: March 12, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15027

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HERALD PUBLISHING COMPANY OF BELLFLOWER,

Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Herald Publishing Company of Bellflower, Compton, California, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Herald Publishing Company of Bellflower and American Newspaper Guild, CIO," Case No. 21-CA-20.44.

In support of this petition the Board respectfully shows:

(1) Respondent is a California corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on September 16, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, Herald Publishing Company of Bellflower, Compton, California, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and

evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

Dated at Washington, D. C., this 1st day of February, 1956.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

[Endorsed]: Filed February 3, 1956.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND PETITION TO SET ASIDE SAID ORDER

Answer to Petition for Enforcement.

Answering the petition of National Labor Relations Board for enforcement of its order, Herald Publishing Company of Bellflower, Respondent, admits, denies and alleges as follows:

I.

Answering paragraph (1) of said petition, Respondent admits it is a California corporation engaged in business in the State of California, within

this judicial circuit. Respondent denies that any unfair labor practices were committed by it within this judicial circuit or in any other judicial circuit. Respondent denies that This Court has jurisdiction of this petition on the ground that Respondent has not engaged in interstate commerce within the meaning of the National Labor Relations Act, during the period in question in this proceeding.

II.

Answering paragraph (2) of said petition, Respondent admits that the Board, on September 16, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, Herald Publishing Company of Bellflower, Compton, California, its officers, agents, successors, and assigns. That on the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel. Otherwise Respondent denies each and every allegation of said paragraph.

III.

Respondent admits the allegations of paragraph (3) of said petition.

Petition to Set Aside Order.

Respondent respectfully petitions the Court to set aside said order of the National Labor Relations Board, on the ground that said order and each and every portion thereof is unsupported by the

evidence upon the whole record, arbitrary, capricious, and abuse of discretion, and not in accordance with law, and hence unconstitutional; and on the further ground that the Board was without jurisdiction to render a decision in the case.

Dated at Los Angeles, California, this .. day of February, 1956.

HERALD PUBLISHING COMPANY OF BELLFOWER,

By /s/ PETER M. WINKELMAN, of LELAND & PLATTNER,
Attorneys for Respondent.

Certificate of Service attached.

[Endorsed]: Filed February 16, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding petitioner National Labor Relations Board will rely upon the following points:

1. The Board properly asserted jurisdiction over the unfair labor practices here involved.

2. Substantial evidence on the record considered as a whole supports the Board's conclusions that respondent interferred with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act.

3. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent discriminatorily discharged employees

London, Ross, Hickey and Farley in violation of Section 8 (a)(1) and (3) of the Act.

NATIONAL LABOR
RELATIONS BOARD,

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

[Endorsed]: Filed March 12, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RESPONDENT INTENDS TO RELY

In this proceeding respondent Herald Publishing Company of Bellflower will rely upon the following points:

1. The Board improperly asserted jurisdiction over the alleged unfair labor practices here involved.

2. Substantial evidence on the record considered as a whole supports the respondent's conclusion that there were no unfair labor practices involved herein and that employees London, Ross, Hickey and Farley were not discharged in violation of the Act.

Respectfully submitted,

LELAND & PLATTNER,

By /s/ PETE M. WINKELMAN,
Attorneys for Respondent.

[Endorsed]: Filed April 26, 1956.

No. 15027

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HERALD PUBLISHING COMPANY OF BELLFLOWER,

Respondent,

and

HERALD PUBLISHING COMPANY OF BELLFLOWER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

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HERALD PUBLISHING COMPANY OF BELLFLOWER,

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

Statement of Case.

On March 29, 1955, Trial Examiner Herman Marx issued an Intermediate Report, finding that Herald Publishing Company of Bellflower had engaged in and was engaging in unfair labor practices. Thereafter, Herald Publishing Company filed exceptions to the Intermediate Report and a brief in support of the exceptions. On September 16, 1955, the National Labor Relations Board affirmed the decision of the Trial Examiner. Herald

Publishing Company thereafter petitioned the Board for a rehearing, which petition was denied.

On February 3, 1956, the Board filed a Petition to enforce its order with the Ninth Circuit Court of Appeals. On March 12, 1956, Herald Publishing Company filed an Answer to said Petition and a Petition to Set Aside said order.

Questions on Appeal.

Petitioner, Herald Publishing Company of Bellflower, hereinafter called "Herald," raises two issues in support of its position:

(1) The Board improperly asserts its jurisdiction for the reasons that (a) the volume of interstate business done by Herald is so small as to fall within the *de minimus* doctrine; and even if the *de minimus* doctrine is not applicable (b) the interstate activities of Herald are such that they fall within the established policy of the Board to refuse jurisdiction in this type of case. By exercising its jurisdiction the Board abused its discretion. (c) Regardless of the decision on the above two points, Herald's business activities do not affect interstate commerce.

(2) The findings of the Board concerning the alleged unfair labor practices regarding employees London, Ross, Hickey and Farley are not supported by the evidence.

I.

The Board Improperly Asserted Its Jurisdiction Because of the Application of the De Minimus Policy.

Herald contends that its activities do not "affect commerce" within the meaning of Sections 2(6) and (7) of the Act, and further contends that even though some relationship to commerce conceivably might be found, the total effect is *so insubstantial* that the *de minimus* doctrine is applicable.

There is judicial authority in the Ninth Circuit that the *de minimus* doctrine is applicable. The court, in *N. L. R. B. v. Reed,* 206 F. 2d 184 (9th Cir., 1953), stated, "Under the doctrine of *de minimus,* the small out-of-state purchases, alone, would seem to be insufficient to justify the Board in assuming jurisdiction of this case."

It was proved by the General Counsel that Herald owns nine separate community papers, all located in the southern part of Los Angeles County, California. All of the papers are published in two printing plants both of which are located in the City of Compton, California. [Tr. p. 149.] This evidence was not contradicted. Herald sends no copies of its newspapers to any points outside of the State of California. Circulation is confined to Los Angeles County communities. [Tr. p. 24.] No evidence was offered to the effect that Herald purchased newsprint or other materials from outside of the state. The newspapers are semi-weekly publications, published Thursday and Sunday. Nine editions appear Thursday and seven editions on Sunday. [Tr. p. 23.] Circulation of the Thursday paper is 142,000. [Tr. p. 175.] Sunday

circulation is between 130,000 and 140,000. [Tr. p. 210.] The papers publish local news of interest to the particular community. [Tr. p. 177.] Revenue is collected from only 30% to 40% of the circulation delivered by the newsboys. [Tr. p. 211.] On other papers, put on newsstands, virtually nothing is collected. [Tr. p. 212.]

The Trial Examiner relied on two main points in asserting that the Herald's activities "affect commerce":

(1) That Respondent advertises nationally-sold products;

(2) That Respondent subscribes to an interstate news service.

National Advertising.

There are two facets to this problem: first, are advertisements placed by local advertising agencies, or by out-of-state agencies; and second, is the advertising of "nationally sold" products, national advertising?

1. Who Places the Advertisements?

The evidence shows that none of the Herald's revenue is obtained from advertising agencies located outside of the State of California, or from local agencies with branch offices outside of the state. Witness Hartwell was asked what the Respondent considered to be "national advertising." His reply was:

> "For the most part, it is that advertising that our salesmen are able to dig up among local accounts that have quotas of advertising funds from merchandise that they have purchased, and try to persuade the local merchant to spend his money in our newspaper rather than in bill-boards, direct mail service or other medium of advertising." [Tr. p. 151.]

Auto Ads All Placed by Local Agencies.

Despite the statement by the Trial Examiner that some of the auto ads were financed by funds allotted to the local dealers by the manufacturer, there is no evidence to support this statement. [Tr. p. 26, Fn. 4.]

Certainly the statement of Brewer, relied on by the Trial Examiner [Tr. p. 42], to the effect that the agencies "perhaps" act on behalf of the manufacturer, is far too speculative to have any probative value on the issue of whether the manufacturer pays for a part of the advertising placed by local dealers. The testimony shows that auto ads were placed by local dealers [Tr. p. 363], and through local advertising agencies; the dealers must approve the ads sent by the agency. [Tr. pp. 363-365.] There is no evidence that the advertising agencies which place these ads do business outside of the State of California.

Witness Hartwell testified that Herald picked up mats and orders from local dealers.

> "We have salesmen who call on all the automobile dealers and persuade them to spend as much of their profit as they can in the local papers." [Tr. p. 160.]

Witness Brewer testified:

> "The dealers themselves authorize the ads, they O. K. the ads. It is their money. *They pay for the ads.* They may come from an agency, so we consider that as local advertising regardless of whether we know or don't know where the mats come from." [Tr. p. 363.] (Emphasis added.)

Brewer further testified that some of the mats came directly from local advertising agencies [Tr. p. 363], but those ads are first authorized by the local dealer. [Tr. p. 364.] Brewer also testified that there has never

been a case where the local agency sent in a mat and after receiving the mat Herald sent display salesmen to solicit ads from the local dealer, with the representation that Herald had a mat for a good ad. [Tr. pp. 364-365.] The evidence thus shows that the ads are placed by either the local automobile dealer, or by the local advertising agency. Where the agency places the ad, it must be approved by the dealer. There is no evidence that any of the agencies do business outside of the State of California, or that the local agencies have branches outside of the State of California.

Brewer testified that Herald does not expend money and effort in getting manufacturers and buyers of various advertising agencies all over the country, as is the case with larger papers.

Is Amount of Advertising of National Products Sufficient to Affect Interstate Commerce?

Although the Trial Examiner states that Brewer testified that a lot of money was spent for automobile advertising [Tr. p. 42], there is nothing in the record to indicate the amount. The books of Herald would show that of a gross revenue of $1,714,377.68, for the year 1954, only $22,257.86, or less than 1.3% of the total revenue, was received from automobile advertising.

2. Nationally-Sold Products.

It is Herald's contention that the mere advertising of nationally-sold products does not affect interstate commerce. The true test for determining national advertising should be, where does the ad come from? If a paper with a circulation of 142,000 has labor difficulties and must close down the newspaper for a period of time, the effect on nationally-sold products will be negligible. How-

ever, if that same paper purchases advertisements from out-of-state agencies, and ceases to make such purchases, there will be a direct effect on interstate commerce.

In addition, the amount of advertisements of national products was so slight as to fall within the *de minimus* doctrine.

For example, Hartwell testified on the advertisements placed in the Herald American of September 16, 1954. [Tr. p. 155.] A "Lucky Lager" ad was 6 columns by 17 inches, that is 102 inches of 168 inches on the page. [Tr. pp. 155-156.] Only three Lucky Lager ads appeared in all of the papers between Spring and October, 1954.

From the transcript, it is apparent that no Hills Brothers advertisement appeared in that particular issue. But there was testimony that there was only one such ad placed in July and one other ad in October of 1954, and that the ad ran for only one day in all nine zones. [Tr. p. 168.]

There was a Luzianne coffee ad of thirty-three inches, or slightly less than 1/6 of a page. [Tr. p. 155.]

There was a Norway sardine ad, two columns, four inches long, or a total of eight inches. The paper consists of 40 pages, 320 columns. [Tr. p. 157.]

There was an R. C. A. and a "Playtex" brassiere ad. [Tr. p. 157.] These ads were placed by local stores and charged to the account of the particular store. [Tr. p. 158.]

Brewer, when asked who paid for the "Playtex" ad replied, "As far as we are concerned, the funds are supplied by Lee's as we bill them and they pay it." [Tr. p. 371.] The evidence further indicates that all ads for the above products were placed by advertising agencies

located in the State of California. [Tr. pp. 166, 170.] As to the "Playtex" ad, Brewer testified:

> "We do not carry the account 'Playtex' through any agency or through any national account on it. We have nothing to do with the national account on it. It is handled at the local level." [Tr. p. 370.]

None of Herald's revenue is derived from any National advertising group within the California Newspapers Publishing Association. [Tr. p. 375.]

U. P. Letters.

The Trial Examiner reached the conclusion that even if there was no "national advertising," Herald's activities fall within the purview of the Board's jurisdiction on account of their use of U. P. newsletters. The Trial Examiner stated on page 4, lines 10 and 11 of his Report that Respondent "subscribes to the news letter in order to retain some right (*not otherwise elaborated in the record.*" (Italics ours.) On page 176 of the Transcript, Witness Smith specifically stated that Herald subscribes to the newsletters in order to retain the right to subscribe to the U. P. wire service if it desired to do so in the future. If Herald did not subscribe to the letter, it would lose this right to later subscribe to the wire service. [Tr. p. 177.]

The Trial Examiner also stated that "the 'Garden & Home Magazine' Supplement to the issue of September 12, 1954, contains a substantial number of items dealing with events that occurred, or places that are located, outside the State of California." [Tr. p. 27.] The evidence showed that there were only three such items in this particular issue. [Tr. p. 180.] The only other evidence of the use of a so-called U. P. release was an article

in the October 21, 1954 Paramount-Hollydale edition. [Tr. p. 181.] Note that there were no U. P. releases in the regular editions of the newspaper, that the only use made of the U. P. letter was in the Sunday magazine section, and that only 4 articles from two editions were introduced into evidence.

Herald excepts to the conclusion of the Trial Examiner, affirmed by the Board, that "such a subscription (U. P. newsletters) is clearly analogous to 'membership in interstate news services.'" [Tr. p. 46.] There is nothing in the decided cases to support such a conclusion. It is clear that the receipt of one weekly newsletter will not have the same effect upon interstate commerce that the constant use of a wire service will. The uncontradicted evidence shows that the payment for the newsletter was "a small amount," and the only reason that Respondent subscribed to the letter was to retain its right to be able to use the U. P. wire service at a future date if it is so desired. [Tr. p. 177.]

Law.

Jurisdictional standards for newspapers were established by the case of *Press, Inc.,* 91 N. L. R. B. 1360 (1950). In 1954 a supposedly new standard for newspapers was established by the case of *Daily Press, Inc.,* 110 N. L. R. B. No. 95 (1954). The Trial Examiner held that by applying the standard set forth in the *Daily Press* case, Herald is within the jurisdiction of the Board. On page 8, line 26, of the Intermediate Report, the Trial Examiner quotes from the *Daily Press* decision as follows:" '. . . that in future cases the Board will assert jurisdiction over newspaper companies which hold membership in *or* subscribe to interstate news, services, *or*

publish nationally syndicated features, *or* advertise nationally sold products, if the gross value of the business of the particular enterprise involved amounts to $500,000 or more per annum.' (Emphasis supplied.) Several features of the quoted language may be noted. First, apart from the monetary standard, the other criteria are stated in the disjunctive. Thus, . . . a newspaper . . . meets the standards if it advertises 'nationally sold products' whether or not it also holds membership in or subscribes to interstate news services, or publishes 'nationally syndicated features.'" It is submitted that this has always been the law, even before the decision in the *Daily Press* case. For example, in the *Daily Press* decision the Board stated: "Among the (jurisdictional) standards adopted in 1950 was the so-called 'newspaper' standard. Pursuant to this standard, the Board asserted jurisdiction over all newspaper companies which hold membership in *or* subscribe to interstate news services, *or* publish nationally syndicated features *or* advertise nationally sold products, irrespective of the size of the particular enterprise involved or the possible effect upon interstate commerce." (Emphasis added.) Note that in this quotation, the conditions were stated in the disjunctive, just as they were in announcing the "new" standards.

The Trial Examiner states in the Intermediate Report [Tr. p. 38], "Second, the assertion of jurisdiction is not conditioned upon any dollar volume of advertising income or of payments for nationally syndicated features, nor upon the regularity or frequency with which such features are used." It is submitted that this is an erroneous interpretation of the *Daily Press* decision. In effect, the Trial Examiner is stating that so long as the gross income of a newspaper is in excess of $500,000

the Board will have jurisdiction over that newspaper. This interpretation of the *Daily Press* decision is not logical.

The purpose of the *Daily Press* decision was not to extend the jurisdiction of the Board, but rather to limit it. Stated in the *Daily Press* decision is the following:

> "It is our opinion that the jurisdictional standards established by the Press, Incorporated decision should be revised so that the Board's long-established policy of limiting the exercise of its jurisdiction to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce can be better attained.
>
> "We have, therefore, determined that in future cases, the Board will assert jurisdiction over newspaper companies which hold membership in or subscribe to interstate news services, or publish Nationally sold products, *if the gross value of business of the particular enterprise involved amounts to $500,000 or more per annum.*" (Emphasis added.)

It is our contention that the decision in the *Daily Press* case overruled prior cases only to the extent that jurisdiction was asserted where the gross value was less than $500,000. It did not overrule the interpretation of prior cases that the Board would assert jurisdiction in cases where newspaper companies held membership in or subscribe to interstate news services, or published nationally-sold products, but only where there was a *substantial* amount of activity along these lines. The mere fact that a newspaper has a gross income of $500,000 or more does not mean that it will have an impact on interstate commerce. Nearly every newspaper advertises *some* nationally-sold product, but this does not mean that the Board

will assert jurisdiction merely because the company ran one advertisement of a nationally-sold product. Suppose that a newspaper with a gross revenue of $500,000 runs one advertisement of a Ford automobile, in one issue, for which it is paid $50.00. It does not subscribe to a wire service, purchase materials from out-of-state, or have any other "national advertising." It seems ridiculous to say that the *Daily Press* decision intended that the Board take jurisdiction in such a case.

There are situations where the Board has asserted that dollar amounts shall determine whether a concern is engaged in interstate commerce. Just to cite a few examples, *Matter of Stanislaus Implement and Hardware Co., Ltd.,* 91 N. L. R. B. 618 ($25,000 shipment test); *Matter of Dorn's House of Miracles, Inc.,* 91 N. L. R. B. 632 (an indirect inflow of $1,000,000 of goods or services annually); *Matter of Federal Dairy, Inc.,* 91 N. L. R. B. 638 (direct inflow of $500,000); *Matter of Hollow Tree Lumber Co.,* 91 N. L. R. B. 635 (furnishing goods or services valued at $50,000 per annum to interstate enterprises).

In each of these cases the monetary standard was based on how much *interstate busines was done,* or how much in the way of goods or services the company *supplied to or received from interstate commerce.* In no case was jurisdiction based merely upon the *gross revenue* of the company without any consideration of the amount of, or the effect of the company's activities upon interstate commerce. This observation bears out Herald's position that the *Daily Press* statement of the $500,000 figure was a limitation on the Board's jurisdiction, and that in addition to having $500,000 of gross revenue the *other* elements mentioned below must also be established.

The Board decisions have interpreted the phrase, "membership in or subscribe to interstate news services, or publish nationally sold products, to mean that these activities must be substantial in relation to the remainder of a newspaper's business. The *Daily Press* case did not change this interpretation but merely added an additional requirement; that the newspaper must also gross $500,000 per year. The *Daily Press* case therefore imposed a more rigid standard for the Board. This interpretation is supported by the opinion in the case. In the dissent of the *Daily Press* case there appears this language:

> "It should also be noted that, in view of the fact that in 1952 over 275,000 employees worked for newspapers in the United States, a not inconsequential portion of the nation's working force is affected by this *limitation* upon the Board's jurisdiction." (Emphasis added.)

The Board restricted its jurisdiction for future actions by stating that in addition to the paper having an impact on interstate commerce it must also have a gross income of $500,000 annually before the Board will take jurisdiction.

Therefore, the cases which have interpreted the term "impact on interstate commerce," which were decided before the *Daily Press* case, will still be applicable.

In Matter of Weiss, 92 N. L. R. B. 993 (1950), the newspapers were shopping guides. They contained some advertising or nationally known products and also ads of public utility corporations. They did not make use of a national news service. During the previous 12 month period, the employer bought the following items: (a) paper, ink, mats and type, and other supplies in the amount of $41,000, 75% of which came from points

outside of the state (N. J.); and (b) machinery in excess of $2,500 in value, all of which came from out of state. The employer received during the same period between $50,000 and $55,000 for printing 7 newspapers, with a circulation of 39,400, all within the state of N. J. The employer also received $64,000 for printing circulars, 10% of which went outside of the state. The Board held that although the operations were not unrelated to commerce, it would not effectuate Board policies to assert jurisdiction in the case.

In *Mutual Newspaper Publishing Co.,* 107 N. L. R. B. 127 (1954), the employer purchased newsprint of a value of $18,000 per annum, directly from outside of the state of California. It purchased a weekly mail service from the United Press office in Sacramento, and from the A. P. and Commercial Newspapers of Chicago. Together these services cost the employer about $400 a year. Fourteen of the Daily Journal's subscribers were located out of state. The employer sells advertising and other services of firms engaged in interstate commerce, of the value of $30,000 per year. The employer supplies U. P. with tips on local stories involving the legal profession, which U. P. may or may not follow up. For this the U. P. paid the employer $50 per week. The Board declined to assert jurisdiction, holding that the empoyer was not an instrumentality of interstate commerce because less than 2% of the total news content of the employer's daily newspapers consisted of material supplied it by the two interstate mail services. The employer received only $210 a year from out of state subscribers and only $50 a week from the U. P.

Wave Publishing Co., 106 N. L. R. B. 1064. The employer in this case printed and published 6 community

newspapers, with a total circulation of about 111,000. In addition, it did a small amount of commercial printing. Four of the papers (circulation 81,000) were published twice weekly, the others were published once a week. The paper had no out-of-state subscribers and was not a member of a wire service. During the prior 12 month period, the company bought supplies in the amount of $225,000, 70% of which came from out-of-state. The Company paid $3,000 annually for syndicated cartoons, columns and advertising mat services. Its gross income was $875,000 almost all of which was from advertising. About $10,000 of its ads were placed by national advertising agencies, located out of the state. Another $10,000 worth represented locally placed ads of nationally sold products. National chain store ads accounted for an additional $78,000 of income. The bulk of the company's income represented ads of local and national products placed by local merchants, reimbursed in part, by the national manufacturer. The Board held that the company engaged in interstate commerce within the meaning of the Act but refused to assert jurisdiction, on the ground that the policies of the Board would not thereby be effectuated.

The Trial Examiner in his Intermediate Report asserts that the facts in the *Wave* case afford a stronger basis for asserting jurisdiction than do the facts in the instant case. [Tr. p. 37.] But the Trial Examiner states that because Herald in the instant case subscribes to the U. P. newsletters, the *Wave* case is distinguishable. [Tr. p. 37.] This distinction is not valid. In the cases cited above, no one factor was considered to be determinative of the issue of jurisdiction, but rather the Board examined all of the facts of the particular case in order to

determine whether the newspaper was engaged in interstate commerce, and if it was whether the policies of the Board would be furthered by asserting its jurisdiction.

In the instant case the papers are all community papers, and are all published in California. Unlike the *Mutual* and *Weiss* cases, none of Herald's newspapers were sent out of the state. Unlike the *Weiss, Wave* and *Mutual* cases, none of Herald's machinery or other supplies and materials were purchased from outside of the state of California. Less than 1.3% of Herald's advertising was from nationally sold products (automobiles), whereas in the *Wave* case about 11% of the gross income was from the advertising of nationally sold products. The mere fact that Herald received a weekly news letter from the U. P. does not bring the instant case outside of the rule announced in the *Wave* case. Herald paid "a small amount" for the letter merely to retain its right to be able to use the U. P. wire service at a future date. [Tr. p. 177.] The letter was received only once a week, and the only actual use made of the letter, which the General Counsel proved, was three articles in one issue of the Sunday magazine section, and one other article in another Sunday magazine issue. These articles were merely "filler material." There is absolutely no evidence that the daily papers, or even the Sunday papers, except in the magazine section, used any U. P. material. This is certainly a weaker case than the *Mutual* case where the employer purchased three weekly letters from three separate interstate services, and in addition was paid by the U. P. for supplying that service with tips for its other subscribers.

Herald contends that the Board by exercising its jurisdiction in this matter abused its discretion and action in violation of its own rulings.

II.

The Activities of Herald Did Not in Any Event Affect Interstate Commerce.

As was stated in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937),

> "This definition (interstate commerce) is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."

Herald contends, that athough many courts have stated that the dollar volume of interstate business will not determine the issue of whether the *de minimus* doctrine will apply, it is Herald's contention that where the dollar volume if interstate activities is as slight as it is in the instant case, it will not affect interstate commerce. A strike at Herald's plant would have little or no effect upon interstate commerce.

It is therefore Herald's contention that the Board erred in asserting its jurisdiction in this matter.

III.

Contrary to the Findings and Conclusions of the Trial Examiner and the Board, Herald Did Not Engage in Any Unfair Labor Practices or Discharge Any Employee Because of Union Activities.

A. Surveillance of Sheets, by Murray.

The finding of the Trial Examiner that Murray did not accord a literal meaning to the remark of Sheets that Sheets had invited Ross to his home to "pitch horseshoes," seems strained. Even if it is true that Murray did not accord a literal interpretation to this remark, it is the position of Herald that the act of Murray of visiting Sheets' home is not a surveillance within the meaning of the Act. First note that no union meeting was actually in progress, nor had a meeting been called by the employees. [Tr. p. 61.] There is no doubt that actual surveillance of a union meeting is a violation of the Act. There are also cases which hold that where the representative of an employer visits a saloon or drug store where employees gather and meet *informally* to discuss union activities, that there is a violation of the Act. (*N. L. R. B. v. Clark Bros. Co.,* 163 F. 2d 373 (2d Cir., 1947); *N. L. R. B. v. Collins & Aikman Corp.,* 146 F. 2d 454 (4th Cir., 1944).) However, no reported decision has gone so far as to hold that an attempted surveillance of a pace where there was no meeting in progress or where there was no evidence that there had ever been either an informal or a formal meeting of employees to discuss union activities, is a violation of the Act. Added to that is the questionability of whether Murray even thought that a union meeting had been called at Sheets' house.

B. Credibility of Smith and Butler.

The Trial Examiner concluded that Butler and Smith were not forthright witnesses. [Tr. p. 77.] One of the bases for this conclusion was that they were evasive not responsive. It is submitted that this is merely their method of answering questions and that a normally conscientious witness might appear to be evasive. Also the events in question occurred months before the hearing, and an honest witness who is honestly attempting to recall events which took place many months before might appear to be evasive in that he is trying to recall the true facts.

C. London's Discharge.

The Respondent excepts to the conclusion that the evidence does not establish that London neglected his duties for organizational work. [Tr. p. 89, fn. 29.]

The Respondent contends that the evidence established that London was discharged for neglecting his duties. On page 408 of the Transcript there is evidence to the effect that London used the company telephone during business hours to engage in union organizational activities. The Trial Examiner stated that there was nothing to indicate that there was a company rule which prohibited London from using the company telephone for personal affairs. However, the very fact that he did use the telephone during business hours indicates that he was not attending to his duties.

There is testimony that London was not discharged because of his union activities but rather because he took Thursday afternoons off. There is testimony that he was warned by Butler of this practice a month or two before he was actually discharged. [Tr. p. 256.]

The conclusion that London's account of the conversation between Smith and himself is essentially undisputed is not accurate. [Tr. p. 86.] The essence of the conversation, according to London, is that he was discharged for union activities. However, Smith denied that London was discharged for union activities, hence Smith disputes the inference raised by London's version of the conversation.

D. Butler's Interrogation of Ross.

The Respondent excepts to the conclusion of the Trial Examiner that Butler's interrogation of Ross, asking him whether he had joined the Guild, was a violation of the Act. The cases hold that such a question is not a violation of the Act. The latest expression of this concept was stated in *N. L. R. B. v. McCatron,* ..... F. 2d ..... (9th Cir., Oct. 13, 1954), wherein the court stated that an employer's interrogation *re* union activity does not in and of itself violate the Act; to violate the Act, the interrogation must either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce. In the *McCatron* case the Court held that the Board erred in finding that the employer violated the Act by interrogating employees regarding union activity, there being no threat in the interrogation. In the instant case, there is no shred of evidence that there was any kind of a threat, express or implied, in Butler's interrogation of Ross.

E. Hickey's and Farley's Discharge.

Respondent contends that there is sufficient evidence to show that the discharge of Hickey was for a lawful purpose. In her application for California Unemploy-

ment Insurance benefits, Hickey stated as the reason for her discharge was an economy cut-back. [Tr. p. 118.] This of course is contrary to the reason which she gave at the Hearing. It seems that there is more likelihood that she would be telling the truth at a time when she had no reason to hide or distort the true facts. In other words, the statement given to the Unemployment Bureau is more likely to be the true version because at that time she had no self-interest in establishing any reason for the discharge.

The Trial Examiner stated that Hickey and Farley were discharged because they wore union buttons, yet another employee, Fitzgerald wore a button in the presence of 2 of the supervisory employees, and there is no evidence that she too was discharged. This would bear out the version given by Respondent's witnesses that Farley and Hickey were not discharged because of union activities. [Tr. p. 120.]

It is therefore, Herald's contention that the order of the Board should be reversed on the grounds that (1) the Board had no jurisdiction over Herald, and (2) the evidence does not support the conclusion that Herald committed any acts in violation of the Act.

Respectfully submitted,

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No. 15027

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HERALD PUBLISHING COMPANY OF BELLFLOWER, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE CASE

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Section 151, *et seq.*),[1] for the enforcement of its order issued against respondent on September 16, 1955, following proceedings under Section 10 of the Act. The Board's decision and order (R. 129-134)[2] are reported at 114 NLRB No. 23. This

[1] The relevant provisions of the Act are printed in the Appendix, *infra*, pp. 22-24.

[2] References designated "R" are to the pages of the printed record. Whenever in a series of references a semicolon appears, the references preceding the semicolon are to the Board's findings, and those following are to the supporting evidence. Occasional references to "G. C. Ex." are to General Counsel's exhibits.

Court has jurisdiction of the proceedings, the unfair labor practices having occurred in the State of California within this judicial circuit.

I. The Board's Finding of Fact

Briefly, the Board found that respondent, in violation of Section 8 (a) (1) of the Act, interrogated its employees as to their union activities, granted them wage increases to deter organizational activities, and otherwise coerced and restrained them in the exercise of rights guaranteed to them by Section 7 of the Act. The Board also found that respondent violated Section 8 (a) (1) and (3) of the Act by its discriminatory discharge of employees London, Ross, Hickey, and Farley. The findings and supporting evidence are detailed below.

A. The operations of the employer

Respondent, a California corporation, has its principal place of business at Compton and is engaged in the publishing of a newspaper known as the Herald American (R. 23; 148-149).[3] The Herald American is a semi-weekly publication which appears in nine editions on Thursday and seven editions on Sunday (R. 23; 176). It also publishes a weekly supplement known as the "Garden and Home Magazine" (R. 23; 176). The circulation of the Thursday editions is approximately 142,000 while the circulation of the Sunday issue is smaller (R. 24; 175). No copies of the Herald American are sent to points outside the State of California, the readers being apparently confined to the

[3] Offices are also maintained in various other communities and are staffed by editorial and advertising employees (R. 24; 191-192).

Los Angeles County communities for which the respective editions are named. (R. 24; 211, 331, 356). However, the Herald American subscribes to and receives each week news letters issued by the United Press, an interstate news service, and occasionally uses United Press data in its publications (R. 27; 144-145, 180-181, G.C. Ex. 3).

Respondent's annual gross income from the publication of the Herald American exceeds $500,000.[4] A substantial portion of this income is derived from advertising accounts (R. 25; 159-160). Among the accounts were those which advertised practically every make of popular car, including Ford, Chevrolet, Studebaker and Packard, and which were solicited by the Herald American from advertising agencies and local automobile dealers (R. 25; 152-153). The newspaper also advertised other nationally sold products such as household appliances, electric shavers, canned vegetable and meat products, watches and women's apparel, which were marketed by such well-known manufacturers as Radio Corporation of America, Bendix, General Electric, Sunbeam, Ronson, Schick, Westinghouse, Elgin, Libby, Gerber and Playtex (R. 131; 157, G. C. Ex. 18).

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[4] The Board observed that respondent in its brief noted that its gross income for 1954 amounted to $1,714,377.68 (R. 130). For the convenience of the Court a copy of respondent's brief has been lodged with the Clerk.

B. The unfair labor practices [5]

1. *Respondent's campaign of interference, restraint and coercion*

The American Newspaper Guild, CIO, herein called the Union, commenced its campaign to organize respondent's employees in the spring and summer of 1954 (R. 56; 329-330). Early in the organizational drive Leonard Lugoff, manager of respondent's classified advertising department, approached Gloria Hickey, an employee under his supervision, and asked her if she had any connection with the Union (R. 64; 330). Hickey replied that she did not, whereupon Lugoff remarked that he hoped that Hickey was not involved with the Union as it would mean immediate dismissal (R. 64; 330). Lugoff told Hickey that he was aware of union activities in the plant and that C. S. Smith, respondent's president, had instructed him to find out who was responsible and, if necessary, to discharge all the employees in his department (R. 65; 330).

On July 12, 1954, employee Raymond Ross and W. W. Butler, respondent's managing editor, attended a Chamber of Commerce meeting (R. 92; 345). As they were leaving the meeting place, Butler engaged Ross in conversation and asked, "I hope you haven't been sucked into this Guild, have you?" (R. 92; 345). Ross replied, "Guild—what do you mean?" (R. 92; 345). Butler stated that he was referring to a newspaper guild and after taking a Guild membership application

[5] Many of the findings detailed hereunder are based on conflicting testimony which the Trial Examiner, upon observation of the witnesses and careful analysis of the evidence, resolved. The Board, upon its independent appraisal of the record, adopted the Trial Examiner's findings and credibility resolutions.

from his pocket and showing it to Ross, he remarked, "One of my boys was approached with this and of course he brought it to me right away and I just wondered if you had been connected with it" (R. 93; 345). Ross then replied, "No, I guess I am too new. I guess they do not trust me" (R. 93; 345).

As set forth more fully *infra,* on July 17 respondent discharged employee Sol London. Within an hour of his discharge employee Oney Fleener met Butler on the street and remarked that London had informed him that he had been discharged because he was a union member (R. 87; 242). Upon hearing this, Butler told Fleener that London had been discharged "because he was working for the union instead of working for the newspaper." (R. 87; 242).

On July 18, respondent, notwithstanding a claim of poor financial condition, granted a wage increase to all but two of the nonsupervisory employees on the editorial staff (R. 67; 300). The amount of these increases ranged from $5 to $15 per week (R. 67; G. C. Exh. 6).

About the same time employee Sheets, upon returning to his home one afternoon after work, found Louis Murray, respondent's sales manager, there (R. 57; 247). When Murray stated that he had come to see if a union meeting was in progress, Sheets inquired as to the reason for such an assumption (R. 58; 247). Murray replied that he had heard him invite Ross to come to his home "to pitch horse shoes" and that "he had assumed that 'horse shoes' was the code word to signify the intention of calling a union meeting" and that he had come to verify it (R. 58; 247). Murray then apologized for his misapprehension (R. 58; 247).

Respondent discharged Ross on August 17 (*infra,* pp. 7-8). A short time later, Robert Clark, general manager of respondent's Lakewood-Los Altos edition, in discussing Ross' discharge with employee Maxine Galt, told Galt that Ross had worn a union button at work and that he had informed Smith, respondent's president, that he "would not work with any union member" and that unless Ross was discharged he would leave respondent's employ (R. 111; 229).

2. *The discriminatory discharges*

a. Sol London

London was hired by respondent as a reporter in July 1950, and was assigned to the Compton office (R. 77; 375). In July 1953, he was transferred to the North Long Beach office (R. 77; 376). During his four years of employment he received a number of wage increases, the last in March 1954 (R. 77; 376).

In the Spring of 1954, London began to engage in organizational activities on behalf of the union (R. 79-80; 401-402). He discussed the benefits of a union with various employees and asked them to sign application cards (R. 80; 402). Among those with whom he discussed the union's organization was Jack Cleland, whose membership he solicited on July 10 (R. 80; 382).

On the morning of July 17, London was advised of his discharge by Butler, respondent's managing editor (R. 81; 383). When London asserted that it was not right to be discharged without notice or explanation Butler remarked, "I cannot tell you why." (R. 85; 383). And when London asked for a further explanation Butler replied, "All I can say is that you thought more about other things than you did of the paper"

(R. 85; 384). London then stated that he was not satisfied with this explanation and thereafter Butler told him he should see Smith, respondent's president (R. 85; 384).

Later in the day London discussed his discharge with Smith at which time Smith informed London that he had not been satisfied with London's "political reporting." (R. 86; 385). When London asked Smith to explain what "reporting" he was referring to Smith replied, "Oh, well, just generally speaking" (R. 86; 385). London then asked Butler, who was also present, why this alleged deficiency had not been mentioned to him during the preceding two weeks (R. 86; 385). Butler replied, "Well, there had been a general deterioration" (R. 86; 385). London then told Smith that he did not think it right that he should be discharged without notice after four years service (R. 86; 385). Upon hearing this complaint, Smith indicated that respondent would give London two weeks' pay instead of notice (R. 86; 386). London departed shortly thereafter (R. 86; 386).

b. Raymond Ross

Respondent hired Ross in March 1954, as city editor of the Lakewood edition (R. 92; 344). Shortly thereafter Ross made application for membership in the union (R. 94; 344).

As related *supra,* pp. 4-5, on July 12, Butler asked Ross if he had joined the union. During the conversation Butler showed Ross a union membership application which one of the employees had brought him. On August 17, Ross reported for work wearing a union button which was about an inch in diameter and which

bore an insignia and the name "The American Newspaper Guild" in black lettering on a white field (R. 94; 351). The union button was affixed to the upper portion of his shirt pocket and Ross wore no jacket that day (R. 94; 351). Late in the afternoon Butler informed Ross that he was being discharged, indicating that it was an economy measure (R. 94; 346). Ross then pointed to his union button and remarked, "of course, I know and you know that I am being discharged because I am wearing this Guild button" (R. 95; 346). Butler again asserted that Ross' discharge was for economy reasons but stated that Ross could interpret that any way he wished (R. 95; 347). Ross then asked Butler if he should "finish out the rest of the edition" and Butler replied that he should discuss that with Smith (R. 95; 349). Ross telephoned Smith and asked the reason for his discharge. The latter stated that it was due to an "economy drive" as he had insisted "on a retrenchment" three or four weeks earlier (R. 95; 347). Smith stated that three or four persons had been laid off and that in this cut back Ross was selected because he "was the newest employee in the department" and that if "business warranted it," respondent would rehire him (R. 96; 348). Ross then finished his work on the edition and was given his separation pay (R. 96; 352). Respondent has never recalled Ross (R. 96; 348).

c. Gloria Hickey

Hickey commenced her employment with respondent in March 1954, and was assigned to classified advertising work in the Bellflower office (R. 97; 329). As previously stated (p. 4), during the month of July, she was asked by Lugoff, her immediate superior, if she

was associated in any way with the union. Lugoff also warned Hickey that union membership would mean immediate dismissal and that Smith, respondent's president, had authorized him to discharge all employees should it become necessary. On the afternoon of August 16, Hickey wore a union button at work (R. 97; 333). That evening there was a union meeting at Hickey's home (R. 97; 318). On the following day Hickey again wore her union button on the job (R. 97; 333). At the end of the day, according to custom, Hickey telephoned Lugoff, who was then at the Compton office, to report her business volume for the day (R. 97-98; 330). Lugoff asked Hickey if she would wait for him at the office as he wanted to discuss something with her (R. 98; 330). Hickey requested that the meeting be deferred and Lugoff agreed to see her the next morning (R. 98; 331).

About nine o'clock on the following morning Lugoff came to the Bellflower office (R. 98; 331). Lugoff gave Hickey her pay check and stated that Smith had "ordered" her discharge as an economy measure (R. 98; 331). Hickey told Lugoff that she believed her discharge was actually due to the fact that she was wearing a union button, and that she was not so "stupid" as to believe the reason Lugoff assigned for her dismissal (R. 98; 331, 336). Lugoff then told Hickey that her work had been satisfactory and that he regretted her discharge (R. 98; 337). Lugoff went on to say that there was no personal feeling involved but "he was sorry if [Hickey] was mixed up in the Guild because that (sic) they would not be able to do anything for [Hickey]" (R. 98; 337). Hickey then remarked that she did not believe she could be discharged for union activities (R. 98; 337). Upon hear-

ing this, Lugoff stated that he had "a situation" similar to this several years ago but "nothing ever came of it" (R. 98; 337). Lugoff continued by saying, "They [the Guild] can't do anything for you (R. 99; 337).

d. Doris Farley

Farley was employed by respondent on June 28, 1954 (R. 97; 315). She worked as a PBX operator and cashier in the Bellflower office (R. 97; 315). Farley attended the union meeting at Hickey's home on August 16, and the next day she appeared at work wearing a union button which she attached to her belt (R. 97; 318).

When Lugoff came to the office on August 18, for the purpose of discharging Hickey, Farley asked him if she also would be discharged as she too was wearing a union button (R. 99; 320). Lugoff replied that he was not her superior but a few minutes later, after Lugoff made a telephone call, Murray, respondent's sales manager, arrived at the office (R. 99; 320). Murray gave Farley her pay check and stated that she was being terminated because of economic reasons (R. 99; 320). When Farley asserted that she did not believe that to be the real reason, Murray stated, "If economic measures doesn't hold up, we will go into the efficiency of your work" (R. 99; 321).

II. The Board's Conclusions and Order

Upon the above facts and the entire record, the Board unanimously agreed with the Trial Examiner that respondent had interfered with, coerced and restrained its employees in violation of Section 8 (a) (1) of the Act. In particular, this finding was based on: (a) Lugoff's interrogation of employee Hickey con-

cerning the Union; (b) his statement to Hickey that employees who were union members would be dismissed immediately and that President Smith had instructed him to determine who was responsible and, if necessary, to discharge all employees in the department; (c) Butler's interrogation of employee Ross concerning the Union; (d) his statement to employee Fleener that employee London had been discharged "because he was working for the union instead of working for the newspaper"; (e) Clark's statement to employee Galt that he had informed Smith that he would not work with a union member and that he would quit unless Ross was discharged; (f) the granting of the wage increase in order to deter organizational activities; and (g) Murray's attempted surveillance of a union meeting and his stating to Sheets the purpose of his visit. (R. 130).

The Board and the Trial Examiner further found that respondent had discharged employees London, Ross, Hickey, and Farley because of their union sympathies and activities and not for the reasons advanced by respondent, thereby violating 8 (a) (1) and (3) of the Act (R. 130, 91, 112, 121).[6]

The Board's order directs respondent to cease and desist from the unfair labor practices found and from in any other manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act (R. 131-132). Affirmatively, the Board ordered respondent to reinstate employees London, Ross, Hickey, and Farley with back pay and to post the usual notices (R. 133).

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[6] Respondent filed no specific exceptions to the Trial Examiner's findings in respect to the wage increase and the discharge of Ross.

ARGUMENT

I. The Board Properly Asserted Jurisdiction Over the Unfair Labor Practices Here Involved

Undisputed evidence (*supra,* p. 3) establishes that respondent's annual gross income from publication of its newspaper exceeds $500,000 and that a substantial portion of the income derives from advertising accounts which include such products as Ford, Chevrolet, Studebaker, and Packard as well as many other nationally sold products. It is also undisputed that respondent subscribes to and receives weekly news letters from United Press, an interstate news service. These facts alone, we submit, demonstrate that respondent's operations affect commerce within the meaning of the Act. Accordingly, the determination whether to assert jurisdiction lay exclusively within the Board's discretion. See *N.L.R.B.* v. *Smith,* 209 F. 2d 905, 907 (C.A. 9); *N.L.R.B.* v. *Daboll,* 216 F. 2d 143, 144 (C.A. 9), certiorari denied, 348 U.S. 917.

Respondent, however, urges that the Board misapplied its applicable jurisdictional standards. The contention, even to the extent it is material, lacks merit. The Board in 1954 set forth new criteria for the assertion of jurisdiction. In *Daily Press, Incorporated,* 110 NLRB 973, the Board stated "that in future cases the Board will assert jurisdiction over newspaper companies which hold membership in or subscribe to interstate news services, or publish nationally syndicated features, or advertise nationally sold products, if the gross value of business of the particular enterprise involved amounts to $500,000 or more per annum." As already shown, respondent's business meets these requirements.

Respondent's reliance upon the Board decisions in *Wave Publications, Inc.,* 106 NLRB 1064, *Mutual*

Newspaper Publishing Co., 107 NLRB 642, and *J. Weiss Printers,* 92 NLRB 993, is misplaced. Those decisions were issued pursuant to earlier jurisdictional standards promulgated in 1950 and supplanted in 1954 by the *Daily Press* case, *supra.* Moreover, in *Press, Inc.,* 91 NLRB 1360, decided in 1950, the Board made it plain that it would assert jurisdiction even under the 1950 jurisdictional standards where, as here, the newspaper involved subscribed to an interstate news service. Respondent was in no wise misled therefore as to the Board's power or willingness to assert jurisdiction over its operations. Cf. *N.L.R.B.* v. *Guy F. Atkinson Co.,* 195 F. 2d 141 (C.A. 9); and see *N.L.R.B.* v. *Forest Lawn,* 206 F. 2d 569, 571 (C.A. 9), certiorari denied, 347 U.S. 915. For the same reason respondent can draw no comfort from the fact that the Daily Press decision upon which the Board relies was not issued until after it engaged in the acts here found to constitute unfair labor practices.

II. Substantial Evidence On the Record Considered As a Whole Supports the Board's Conclusion That Respondent Interfered With, Restrained, and Coerced Its Employees In Violation Of Section 8 (a) (1) Of the Act

The facts summarized above (*supra,* pp. 4-6) establish that respondent interrogated its employees concerning their union activities, threatened to discharge those employees who were union members, warned that employees had been discharged because of their union activities and that supervisors would not work with union members, granted wage increases to discourage union activity, and attempted to engage in the surveillance of a union meeting.[7] That such conduct con-

[7] As already noted (*supra,* n. 5) many of the findings here made were based on conflicting testimony which the Trial Examiner and

stitutes interference, restraint and coercion violative of Section 8 (a) (1) of the Act is too well-settled to require discussion. See, e.g., *N.L.R.B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 905 (C.A. 9); *N.L.R.B.* v. *Parma Water Lifter Co.,* 211 F. 2d 258, 262 (C.A. 9), certiorari denied, 348 U.S. 829; *N.L.R.B.* v. *Geigy Co.,* 211 F. 2d 553, 557 (C.A. 9), certiorari denied, 348 U.S. 821; *N.L.R.B.* v. *Wagner Transportation Co.,* 227 F. 2d 200, 201 (C.A. 9), certiorari denied, 351 U.S. 919; *N.L.R.B.* v. *Grand Central Aircraft Co., Inc.,* 216 F. 2d 572, 573 (C.A. 9).

Contrary to respondent's contention, Butler's interrogation of Ross satisfies the rule that "interrogation regarding union activity does not in and of itself violate Section 8 (a) (1) * * * [and that] such interrogation must either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce." *N.L.R.B* v. *McCatron,* 216 F. 2d 212, (C.A. 9), certiorari denied, 348 U.S. 943. Here, the interrogation was conducted by a supervisor who was well aware of the union activities in the plant and openly admitted that employees had been discharged because of their union sympathies. Moreover, the interrogation was followed by the discriminatory discharge of Ross and three other employees. Cf. *N.L.R.B.* v. *Chautauqua Hardware Co.,* 192 F. 2d 492, 494 (C.A. 2).

Respondent's further contention that Murray's attempt to engage in surveillance was not a violation of the Act because no union meeting was in progress, is without merit. Although no meeting was being con-

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the Board resolved adversely to respondent. "For obvious reasons questions of credibility were for the Examiner." *N.L.R.B.* v. *State Center Warehouse,* 193 F. 2d 156, 157 (C.A. 9); *N.L.R.B.* v. *Dant,* 207 F. 2d 165, 167 (C.A. 9).

ducted Murray informed Sheets at the outset of the purpose of his visit, thereby impressing upon at least one employee respondent's readiness to engage in unlawful surveillance of its employees' organizational activities. Moreover, under settled authority, it is "not necessary to show duress but only interference, and it is not necessary that the interference shall be successful." (*Rapid Roller Co.* v. *N.L.R.B.,* 126 F. 2d 452, 457 (C.A. 7), certiorari denied, 317 U.S. 650). "The test is whether the employer engaged in conduct which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *N.L.R.B.* v. *Illinois Tool Works,* 153 F. 2d 811, 814 (C.A. 7).

Accordingly, the Board properly concluded that respondent, independently of its violations of Section 8 (a) (3), violated Section 8 (a) (1) of the Act.

III. Substantial Evidence on the Record Considered as a Whole Supports the Board's Conclusion that Respondent Discriminatorily Discharged Employees London, Ross, Hickey, and Farley in Violation of Section 8 (a) (1) and (3) of the Act

The evidence summarized above (*supra,* pp. 6-10) fully supports the Board's conclusion that the discharges of London, Ross, Hickey and Farley were discriminatorily motivated.

A. London

As previously related, London during the spring of 1954, became active in the union's organizational activities. He discussed the benefits of a union with respondent's employees and requested that they sign union application cards. Butler, respondent's managing editor, was aware of London's union activities having admittedly received information, which he characterized as

"vague" and "indirect" that London "had been spending working time" at the plant "soliciting membership for the Union" (R. 81; 251-252).

During his four years in respondent's employ London had received several wage increases, the last as late as March 1954. Nevertheless, despite London's apparently satisfactory work record Butler, on July 17, discharged London without notice. When London attempted to learn the reason for this sudden action Butler stated, "I cannot tell you why." London then pressed Butler for a fuller explanation and Butler remarked, "All I can say is that you thought more about other things than you did of the paper." At Butler's suggestion, London then sought out Smith, respondent's president, for an explanation. Smith informed London that he had not been satisfied with the latter's "political reporting," and when London asked Smith to explain what he meant by "reporting," Smith replied, "Oh, well, just generally speaking." At the hearing, respondent advanced none of these inconsistent reasons as the cause for London's discharge, Butler testifying that he had discharged London because he had left his work early on a certain Thursday (R. 81, 252). However, London had earlier informed Butler that he was leaving early on Thursday afternoons and the latter had given his approval (R. 82; 392).[8]

It is well established that the giving of evasive, inconsistent or contradictory reasons by an employer for the discharge of an employee may be considered, as it was in the instant case, in determining the real motive which actuated the discharge. See *N.L.R.B.* v. *Home-*

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[8] After learning of London's practice of leaving early Butler remarked, "I know that as well as you and as long as you turn in your copy, that is all we require" (R. 82; 392).

dale Tractor and Equipment Co., 211 F. 2d 309, 314 (C.A. 9), certiorari denied, 348 U.S. 833; *N.L.R.B.* v. *International Furniture Co.,* 212 F. 2d 431 (C.A. 5). Moreover, within an hour of London's discharge Butler told Employee Fleener that London had been discharged "because he was working for the union instead of working for the newspaper." Under all these circumstances and with a background of other unlawful interference and discrimination, the Board could reasonably find, as it did (R. 91), that London's discharge was discriminatorily motivated within the meaning of Section 8 (a) (3) and (1) of the Act.

B. Ross, Hickey and Farley

Similarly well supported is the Board's finding that employees Ross, Hickey, and Farley were discriminatorily discharged. As we have shown, on July 12 Butler asked Ross if he had joined the union. Butler indicated that a certain employee had presented him with a union membership application and that as a consequence he was interested in learning Ross' union status. Five days later, on August 17, Ross came to work in the morning wearing a union button affixed to the upper portion of the pocket of his shirt. Ross wore no jacket on that day. In the afternoon Butler told Ross that he was being discharged for economy reasons. Upon hearing this, Ross pointed to his union button and stated, "of course, I know and you know that I am being discharged because I am wearing this Guild button." Butler maintained his original position but told Ross that he could interpret that any way he wished.

During the month of July, Hickey was questioned by Lugoff, her supervisor, in respect to her union status. In the course of the conversation Lugoff told

Hickey that union membership would cause immediate dismissal and that he had the authority to discharge all the employees if it was necessary. On the afternoon of August 16, Hickey wore a union button at work and that evening there was a union meeting at her house. On August 17, Hickey again wore her union button on the job. At the close of the day, when Hickey telephoned Lugoff to report her business volume for the day, Lugoff informed her that he wanted to see her. At Hickey's request, they did not meet until the following morning at which time Lugoff gave Hickey her pay check and stated that Smith had "ordered" her discharge as an economy measure. Hickey then remarked that she believed that her discharge had been effected because she was wearing a union button and that she was not so "stupid" as to accept the reason Lugoff had given. Lugoff thereupon stated that Hickey's work had been satisfactory and that he regretted her separation.

On August 16, Farley attended the union meeting at Hickey's home. The next day she came to work wearing a union button attached to her belt. When Lugoff appeared at the office on August 18, to discharge Hickey, Farley asked Lugoff if she would also be discharged as she, too, was wearing a union button. Lugoff replied that he was not her supervisor and then placed a telephone call. A few minutes later Murray arrived at the office and gave Farley her pay check, asserting that her termination was due to economic reasons.

The uniformity of pattern and the timing of the several discharges are significant. Ross' discharge occurred on the day that he wore the union button at work for the first time. Hickey had worn her union

button for a day and a half when she was discharged, while Farley's discharge took place after she had worn the union button for a single day. Surely, "the coincidence in time * * * would seem somewhat significant" (*N. L. R. B.* v. *Geraldine Novelty Co., Inc.,* 173 F. 2d 14, 18 (C. A. 2)).

Moreover, the Board's conclusion that the discharges were discriminatorily motivated is fortified by the fact that the reasons advanced for the dismissals do not stand under scrutiny, *N. L. R. B.* v. *Dant,* 207 F. 2d 165, 167 (C. A. 9). Although respondent contended that the three employees were discharged as an economy measure and that it was "losing considerable money," wage increases were granted to nearly all the nonsupervisory editorial employees about one month before Smith issued his "flat ultimatum" to reduce the staff (R. 67; 300, G. C. Ex. 6). A short time after the discharges, respondent hired two editorial employees and advertised in its paper for a classified advertising solicitor (R. 106-107; G. C. Ex. 11). And although respondent asserted that efficiency was a factor in determining those employees to be discharged, Smith told Ross that he was selected because of departmental seniority, despite the fact that an employee with less seniority than Ross was retained. (R. 105-106; G. C. Ex. 6). Moreover, Lugoff testified that Hickey had been selected because of friction between them and yet he had praised her performance on the job and expressed regret at the time of her separation (R. 116; 337).

And finally, various remarks made by respondent's officials strengthen the conclusion reached by the Board. Shortly after Ross was discharged Clark remarked to employee Galt that Ross had worn a union button at work and that he had told Smith that unless Ross was

discharged he would leave his job. Lugoff told Hickey at the time of her discharge that "he was sorry if [Hickey] was mixed up in the Guild because that they would not be able to do anything for [Hickey]." And when Hickey remarked that she did not believe she could be discharged for union activities, Lugoff asserted that he had a similar "situation" several years ago but "nothing ever came of it." Lugoff then stated, "They [the Guild] can't do anything for you." When Murray discharged Farley he remarked, "If economic measures doesn't hold up, we will go into the efficiency of your work."

For all the foregoing reasons, the Board properly rejected respondent's contention that the employees in question were discharged for reasons other than union activities. Moreover, even if it were assumed that respondent would have had valid reasons, economic or otherwise, for discharging the employees, the Board on the instant record was justified in concluding that none of these reasons was the actual ground for the dismissals. "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *Wells, Inc.* v. *N. L. R. B.,* 162 F. 2d 457, 460 (C. A. 9). See also *N. L. R. B.* v. *L. Ronney & Sons Furniture Mfg. Co.,* 206 F. 2d 730, 737 (C. A. 9), certiorari denied, 346 U. S. 937; *N. L. R. B.* v. *Whitin Machine Works,* 204 F. 2d 883, 885 (C. A. 1).

CONCLUSION

For the reasons stated above, the Board's order should be enforced in full.

Respectfully submitted,

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JULY 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engag-

ing in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to

be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

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No. 15029

United States
Court of Appeals
For the Ninth Circuit

ALLEEN S. MILDREN, and DONALD LEE MILDREN,

Appellants,

vs.

JESSIE MILDREN,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-27-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Southern District of California, Central Division

Civil Action No. 17253-WB

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

ALLEEN S. MILDREN, DONALD L. MILDREN, PAUL MILDREN, JR., JESSIE MILDREN, DOE ONE, DOE TWO and DOE THREE,

Defendants.

COMPLAINT

(Declaratory Relief and Interpleader)

Plaintiff complains of defendants above named and for cause of action alleges as follows:

I.

That jurisdiction of this Court exists under the provisions of Title 28, United States Code, Section 1332. That plaintiff is a citizen and resident of the State of New York; that each of the defendants is a citizen of one of the States of the United States other than the State of New York; that the amount in controversy exclusive of interest and costs exceeds the sum of $3,000.00. [2*]

II.

That at all times mentioned herein plaintiff has been and now is a corporation organized and exist-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

ing under and by virtue of the laws of the State of New York with its principal place of business in said State, and authorized to engage in and engaging in the business of issuing policies of life insurance and kindred sums of insurance, both in the State of New York and in the State of California.

III.

That defendant Alleen S. Mildren was formerly the wife of Paul Mildren, the insured named and designated in the five policies of insurance hereinafter mentioned, and is a citizen and resident of the State of California.

That defendants Donald L. Mildren and Paul Mildren, Jr., are the sons of said insured, Paul Mildren, and the aforesaid defendant Alleen S. Mildren and are each citizens and residents of the State of California; that plaintiff is informed and believes and therefore alleges that said defendants Donald L. Mildren and Paul Mildren, Jr., are each over sixteen years of age and that each of said defendants has now attained his majority and is twenty-one years of age or more.

That defendants Doe One, Doe Two and Doe Three are fictitiously named defendants, the identity of each of whom is now unknown to plaintiff and each of whom is a citizen and resident of one of the States of the United States, other than the State of New York and each of whom claims to have an interest in or to the proceeds of one or more of the five hereinafter mentioned policies of insurance is-

sued by plaintiff to Paul Mildren as the insured. That when the true name, residence and citizenship of any one or more of said fictitiously named defendants has been discovered by plaintiff, plaintiff will ask leave of Court to amend this complaint to set forth the same. [3]

IV.

That Paul Mildren, the insured under each of the five hereinafter mentioned policies of insurance, and sometimes hereinafter referred to as the "insured," died on or about July 21, 1954, in the City of Los Angeles, County of Los Angeles, State of California. That on the dates hereinafter in this paragraph IV set forth plaintiff issued to the said Paul Mildren as the insured plaintiff's policies of insurance numbered and described as follows, to wit:

Policy No.	Policy Type	Date	Original Face Amount
3,373,875	Ordinary Life	10/22/24	$ 2,500.00
3,377,665	Ordinary Life	10/30/24	2,500.00
3,708,187	Ordinary Life	10/11/26	3,000.00
5,448,542	Endowment Annuity	12/28/38	10,000.00
5,586,988	Endowment Annuity	2/19/40	3,125.00

That by rider dated 2/8/43 described in Endowment Annuity Policy Number 5,448,542 said policy was converted into a reduced paid up Annuity Endowment policy in the face amount of $2,476.00.

That by reason of dividend accruals the face amount of policies numbered 3,373,875, 3,377,665, 3,708,187 and 5,886,988 has each been increased as follows:

Policy No.	Increased Face Amount
3,373,875	$ 2,505.78
3,377,665	2,505.78
3,708,187	3,008.62
5,886,988	3,138.56

That in and by the terms of said policies and each of them it was agreed that there would be paid to the designated beneficiary named in each of said policies, upon receipt by plaintiff of due proof of the death of the insured (and, in the case of Endowment Annuity policies numbered 5,448,542 and 5,586,988, upon receipt of due proof in respect to each of said two policies that such [4] death occurred prior to the due date of the first Life Income Payment proceeds to be paid under each of said policies on December 28, 1960, and February 19, 1961, respectively), the face amounts payable under each of said policies, said respective face amounts to be payable in the manner and amounts and upon the terms, provisions and contingencies provided in said respective policies or in Modes of Settlement attached to said policies respectively and forming a part thereof.

V.

That the beneficiary originally named in said policy No. 3,373,875 was William Mildren, referred to therein as the father of said insured. That on or about January 10, 1935, said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy that, in the event defendant Donald L. Mildren survived said in-

sured and was over sixteen years of age at the date of death of said insured, the proceeds of said policy of insurance should be paid in monthly installments of $50.00 each, so long as said proceeds should suffice, first to said defendant Donald L. Mildren during his lifetime, then to defendant Paul Mildren, Jr., during his lifetime, then to defendant Alleen S. Mildren during her lifetime, then to the executors or administrators of the last survivor.

VI.

That the beneficiary originally named in said Ordinary Life policy of insurance No. 3,377,665 was Jessie Wood, referred to therein as the mother of said insured; that plaintiff is informed and believes and therefore alleges that said Jessie Wood is one and the same person as Jessie Mildren, one of the named defendants herein. That on or about October 16, 1939, said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy [5] of insurance that, in the event defendant Paul Mildren, Jr., survived said insured and was over sixteen years of age at the date of death of said insured, the proceeds of said policy of insurance should be paid in equal monthly installments for a period of four years certain, first to said defendant Paul Mildren, Jr., during his lifetime, then to defendant Donald L. Mildren during his lifetime, and that following the death of defendant Donald L. Mildren during said four-year period the surrender value of any re-

maining unpaid installments should be paid to defendant Alleen S. Mildren, if living, otherwise to the executors or administrators of defendant Donald L. Mildren.

VII.

That the beneficiary originally named in said Ordinary Life policy of insurance No. 3,708,187 was defendant Alleen S. Mildren, referred to therein as the wife of said insured. That on or about January 10, 1935, said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy of insurance that in the event defendant Alleen S. Mildren survived said insured, the proceeds of said policy of insurance should be paid to said defendant Alleen S. Mildren in equal monthly installments for twenty years certain and continuing during her lifetime, and that in the event said defendant Alleen S. Mildren should die prior to the payment of all payments certain, any remaining payments certain should be paid as and when due to such of the insured's children as should then be living, equally, and that at the death of the last survivor of said children, the commuted value of any remaining payments certain should be paid to the executors or administrators of such last survivor.

VIII.

That the beneficiary originally named in said Endowment Annuity policy of insurance No. 5,448,542 was defendant Alleen S. [6] Mildren, if living, otherwise defendants Donald L. Mildren and Paul

Mildren, Jr., share and share alike, or the survivor of them. That on or about February 21, 1939, said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy of insurance that in the event defendant Alleen S. Mildren survived said insured, the proceeds of said policy of insurance should be paid to said defendant Alleen S. Mildren in monthly installments of $50.00 each so long as said proceeds should suffice, during her lifetime, and after her death should be paid to said insured's children, defendants Donald L. Mildren and Paul Mildren, Jr., or to the survivor of them, all upon the contingencies and in the manner more specifically set forth in said Mode of Settlement.

IX.

That the beneficiary originally named in said Endowment Annuity policy of insurance No. 5,586,988 was defendant Alleen S. Mildren, if living, otherwise defendants Donald L. Mildren and Paul Mildren, Jr., equally, share and share alike, or the survivor of them.

X.

That on or about April 8, 1953, in that certain divorce action in the Superior Court of the State of California, in and for the County of San Bernardino, entitled "Alleen S. Mildren, Plaintiff and Cross-Defendant, vs. Paul Mildren, Defendant and Cross-Complainant," and numbered 68261 in the files and records of said Court, an interlocutory decree

of divorce was made and entered adjudging and decreeing that defendant Alleen S. Mildren was entitled to a divorce from said insured Paul Mildren. That said interlocutory decree provided in relevant part as follows:

"4. That the defendant and cross-complainant be and he is hereby awarded as his sole and separate property the following: [7]

* * *

"(b) Life insurance policies.

* * *

"5. That each of the parties be and they are hereby ordered to deliver to the other any of the real or personal property in the possession of the person or party other than the one to whom the same is herein awarded."

That the final decree of divorce in said divorce action was made and entered on or about April 12, 1954; that said final decree continued in effect the provisions of said interlocutory decree with respect to the division of property between the parties to said divorce action, to wit, defendant Alleen S. Mildren and said insured, and specifically the portions of said interlocutory decree quoted hereinabove in this paragraph X.

XI.

That on or about June 17, 1953, said insured executed and there was thereafter furnished to plaintiff a further and additional request for change of beneficiary under said five policies of insurance and

each of them, and therein, in said request for change of beneficiary, said insured designated as his intended beneficiary under each of said policies of insurance defendant Jessie Mildren, described in said request for change of beneficiary as the mother of said insured.

XII.

That each of said policies of insurance contained a rider or other provision providing in effect, among other things, that the right to change the beneficiary thereunder was reserved solely to the insured, to the exclusion of the beneficiary, and that any change of beneficiary thereunder should be effective only upon endorsement of the same on such policy of insurance by plaintiff. That the aforesaid changes of beneficiary referred to hereinabove in paragraphs V through IX, inclusive, are each properly endorsed on [8] the respective policies of insurance in said paragraphs V through IX described, but that the attempted or purported change of beneficiary referred to in paragraph XI hereinabove has never been endorsed on any of said policies of insurance by reason of said insured's failure to submit said policies to plaintiff whether at the time of requesting said change of beneficiary, or otherwise, for the purpose of permitting plaintiff to endorse said change of beneficiary thereon; that plaintiff is informed and believes and therefore alleges that said insured's failure to submit said policies of insurance for endorsement of said last mentioned change of beneficiary was due to the fact that said policies of insurance were not at the time of such

requested change in the possession or under the control of said insured, but were in the possession or under the control of defendant Alleen S. Mildren and were withheld from said insured by said defendant Alleen S. Mildren.

XIII.

That it is uncertain and unknown to plaintiff herein whether the aforesaid interlocutory and final decrees of divorce were valid and effective to constitute said insured the sole owner of said five policies of insurance as his separate property; that it is uncertain and unknown to plaintiff herein whether the aforesaid attempted or purported change of beneficiary referred to in paragraph XI hereinabove was valid and effective to change the beneficiary under each of said policies of insurance in the absence of endorsement of such change by plaintiff on each of said policies of insurance.

That defendant Jessie Mildren claims that said interlocutory and final decrees of divorce and said attempted or purported change of beneficiary referred to in paragraph XI hereinabove were each valid and effective, and that accordingly said defendant Jessie Mildren is the sole beneficiary under said five policies of insurance and each of them and is entitled to receive [9] payment of the entire proceeds thereof; that said defendant Jessie Mildren has demanded payment to her by plaintiff of the entire proceeds payable under each of said policies of insurance.

That defendant Alleen S. Mildren claims that the aforesaid attempted or purported change of beneficiary referred to in paragraph XI hereinabove was invalid and ineffective by reason of the fact that said insured was incompetent at the time of execution of said purported or attempted request for change of beneficiary, and by reason of the fact that said change was never endorsed on any of said five policies of insurance, and accordingly said defendant Alleen S. Mildren claims that she now is and remains the primary beneficiary under policies of insurance Nos. 3,708,187, 5,448,542 and 5,586,988 and is entitled to receive payment of the proceeds thereof for the time and in the amounts and manner provided and specified in each of said three policies of insurance or in Modes of Settlement attached thereto and forming a part thereof.

That defendants Donald L. Mildren and Paul Mildren, Jr., claim or may claim as contingent beneficiaries under policies of insurance Nos. 3,708,187 and 5,448,542 to be entitled to payment of the remaining proceeds thereof at the times and in the manner and amounts specified in said two policies of insurance or in Modes of Settlement attached thereto and forming a part thereof in the event of the death of defendant Alleen S. Mildren prior to payment in full of the proceeds of said policies.

That for the same reasons as are set forth in this paragraph XII above as being asserted by defendant Alleen S. Mildren for the alleged invalidity thereof, defendant Donald L. Mildren further claims

that the aforesaid attempted or purported change of beneficiary referred to in paragraph XI hereinabove was invalid and ineffective and that he is and remains the primary beneficiary under said policy of insurance No. 3,373,875 and is entitled to receive payment of the proceeds thereof at the times and in the [10] amounts and manner provided and specified in said policy of insurance or in Mode of Settlement attached thereto and forming a part thereof.

That defendant is informed and believes and therefore alleges that Paul Mildren, Jr., claims that the aforesaid attempted or purported change of beneficiary referred to in paragraph XI hereinabove was invalid and ineffective and that he is and remains the primary beneficiary under said policy of insurance No. 3,377,665 and is entitled to receive payment of the proceeds thereof at the times and in the amounts and manner provided and specified in said policy of insurance or in Mode of Settlement attached thereto and forming a part thereof.

That by reason of the alleged invalidity of said request for change of beneficiary mentioned in paragraph XI above, defendant Alleen S. Mildren further claims, as contingent beneficiary under said policies of insurance Nos. 3,373,875 and 3,377,665, to be entitled to payment of the proceeds thereof at the times and in the manner and amounts provided and specified in said policies of insurance, or in Modes of Settlement attached thereto and forming a part thereof, in the event of the death of defend-

ant Donald L. Mildren prior to payment in full of the proceeds of said policy No. 3,373,875 or in the event of the death of defendant Paul Mildren, Jr., prior to payment in full of the proceeds of said policy No. 3,377,665.

XIV.

That accordingly there has arisen and now exists an actual controversy between plaintiff and defendants and between the respective defendants under and by virtue of the provisions of the above described five policies of insurance numbered 3,373,-875, 3,377,665, 3,708,187, 5,448,542 and 5,586,988 and under and by virtue of the Mode of Settlement provisions contained in policies numbered 3,373,875, 3,377,665, 3,708,187 and 5,448,542 relating to [11] the rights of said defendants, or some of them, to the payment of all or a portion of the proceeds of said insurance policies. That plaintiff desires and hereby applies to the Court for a declaration of its rights and duties in the premises, particularly with respect to its rights and duties as to the defendants herein under and pursuant to the terms, provisions and conditions of said policies of insurance, and each of them, and the Mode of Settlement provisions contained in or made a part of said policies numbered 3,373,875, 3,377,665, 3,708,187 and 5,448,542.

XV.

That the claims, contentions and interests of each and all of the defendants herein in or to the proceeds of said policies of insurance are conflicting;

that plaintiff does not know and cannot safely determine for itself which one or more of said respective claims, contentions and interests are valid, and cannot safely make payment to any one or more of said defendants of the whole or any part of said insurance proceeds. That by reason of said adverse and conflicting claims plaintiff is in grave danger of being harassed, damaged and subjected to multiple and vexatious liability in respect to each of said policies on a single obligation thereunder, together with attendant costs and expenses. That plaintiff at all times has been and now is desirous and willing to pay, to the person or persons properly entitled thereto, any part or all of the proceeds payable under said policies, in accordance with the terms, provisions and conditions thereof and in accordance with all valid and unrevoked designations of beneficiaries thereunder and in accordance with all valid and unrevoked Modes of Settlement forming a part of said policies or any of them.

XVI.

That contemporaneously with the commencement of this action plaintiff has deposited with the Clerk of this Court the sum of $3,138.56, constituting the face amount plus dividend accruals, [12] comprising the entire proceeds of policy of insurance No. 5,886,988 and has deposited with the Clerk of this Court the further sum of $10,496.18, constituting the face amount plus all dividend accruals, comprising the entire proceeds of policies of insurance numbered 3,373,875, 3,377,665, 3,708,187 and

5,448,542. That the deposit with the Clerk of this Court of the said sum of $10,496.18 is conditioned upon said sum, less reasonable attorneys' fees and costs deductible therefrom as hereinafter mentioned, being returned to plaintiff by the Clerk of this Court in the event that this Court shall adjudge and decree that the attempted or purported request for change of beneficiary mentioned and described in paragraph XI hereinabove was invalid or ineffective and that accordingly the income settlement provisions contained in and made a part of said policies of insurance numbered 3,373,875, 3,377,665, 3,708,-187 and 5,448,542 are in force and effect.

XVII.

That it was and is necessary for plaintiff to institute this action to avoid a multiplicity of actions and to avoid unnecessary costs, attorneys' fees and expenses of suit, and to prevent irreparable damage to plaintiff by reason of being subjected to multiple and vexatious liability in respect to each of said five policies of insurance upon a single obligation thereunder. That it was and is necessary for plaintiff to employ, and it has employed, the undersigned as its attorneys of record to prepare and file and prosecute this action, and plaintiff has agreed to pay said attorneys a reasonable fee for their services rendered herein. That said agreement was made and incurred in good faith by plaintiff and was necessitated by the aforesaid conflicting claims of defendants herein, and each of them. That said expenses incurred and expended by plaintiff and

such sums as plaintiff will be compelled to expend further in the prosecution of this suit and in the payment of its attorneys' fees are and should be declared to be a legal charge upon [13] the moneys heretofore paid into the Registry of this Court or the proceeds payable under said policies of insurance and said sums constituting plaintiff's expenses incurred and to be incurred, as aforesaid, in connection with this litigation, should be repaid to plaintiff from and out of the moneys deposited by it into the Registry of this Court.

Wherefore, plaintiff prays:

1. That the process of subpoena issue out of this Court addressed to and, at the request of plaintiff, be served by the United States Marshal for the United States District Court, for the Southern District of California, or for such other District wherein any of said defendants reside, requiring the several defendants to appear and answer this complaint on or before the 20th day after service of the said process.

2. That the defendants may be decreed to litigate and settle among themselves their rights or claims to the proceeds payable under said policies of insurance and deposited in Court, as aforesaid.

3. That this Court determine the validity and priority of the respective claims of defendants, and each of them, and the obligations of plaintiff and adjudicate and direct the disposition of any amounts payable under or with respect to any or all of said

policies of insurance in accordance with the terms and provisions thereof, and subject to the prior payment of plaintiff's costs, expenses and attorneys' fees.

4. That except as otherwise expressly adjudicated by decree of this Court, plaintiff be released and discharged of and from any and all obligations or liability under or arising out of or with respect to said policies of insurance, or any of them, or any provision thereunder.

5. That the defendants, and each of them, be enjoined and restrained during the pendency of this action from assigning or [14] transferring to any person or persons any claim which they or any of them may have with respect to said policies of insurance or any provisions thereof or, any proceeds thereof.

6. That the defendants be ordered and decreed to deliver up and surrender said five policies of insurance, together with all endorsements thereto, to the Clerk of this Court for endorsement in respect to any valid change of beneficiary not yet endorsed on any of said policies and thereafter, subject to the contingency hereinafter mentioned in paragraph 8 of this prayer pertaining to the four policies therein specified, for cancellation and extinguishment of all further liability of plaintiff under all five of said policies of insurance.

7. That if the said defendants are unable to deliver up said policies of insurance for any reason

whatsoever, that the decree herein shall provide that said policies of insurance or any thereof not delivered up as aforesaid have been fully paid and cancelled or otherwise that they are of no further force or effect, and that the person or persons who may be adjudged to be entitled to the amount due thereunder shall be required to give to this plaintiff a bond of indemnity or other assurance satisfactory to this Court conditioned that the plaintiff will not again be compelled to pay the amount or any amount due or payable thereunder to any other person or persons who may subsequently produce said policies of insurance irrespective of whether or not such policies of insurance are submitted to plaintiff accompanied by an assignment thereof or a request for change of beneficiary thereunder executed by said insured.

8. That in the event it is determined by this Court that the attempted or purported change of beneficiary mentioned and described in paragraph XI hereinabove is invalid or ineffective, then in such event the proceeds, inclusive of dividend accruals, of policies numbered 3,373,875, 3,377,665, 3,708,-187 and 5,448,542 be returned to plaintiff, by the Clerk of this Court, after deducting [15] and first paying to plaintiff its costs of suit and reasonable attorneys' fees payable therefrom, for payment by plaintiff in installment payments to the person or persons entitled thereto pursuant to the income settlement provisions contained in said Modes of Set-

tlement made a part of said policies numbered 3,373,875, 3,377,665, 3,708,187 and 5,448,542.

9. That except as may be herein ordered by this Court upon final hearing the said defendants, and each of them, their agents, attorneys, representatives and all persons claiming by, through or under them, or either of them, may be perpetually enjoined and restrained from instituting or prosecuting any suit or proceeding or any action or actions in any state Court or in any other federal Court, or in any other Court of law or equity, against this plaintiff on account of said policies of life insurance numbered 3,373,875, 3,377,665, 3,708,-187, 5,448,542 and 5,886,988 issued on the life of Paul Mildren or the moneys payable thereunder.

10. That plaintiff do have such other further, different and additional and general relief as to the Court may seem just and equitable in the premises.

NEWLIN, HOLLEY, TACKABURY & JOHNSTON,

By /s/ GEORGE W. TACKABURY,
Attorneys for Plaintiff.

[Endorsed]: Filed September 22, 1954. [16]

United States District Court, Southern District of California, Central Division

Civil Action No. 17253-WB

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

ALLEEN S. MILDREN, DONALD L. MILDREN, PAUL MILDREN, JR., JESSIE MILDREN, DOE ONE, DOE TWO and DOE THREE,

Defendants.

JESSIE MILDREN,

Cross-Complainant,

vs.

ALLEEN S. MILDREN, DONALD L. MILDREN and PAUL MILDREN, JR.,

Cross-Defendants.

CROSS-COMPLAINT

(Setting Up Claim in Interpleader Action)

Defendant and cross-complainant Jessie Mildren alleges:

I.

That jurisdiction of this Court exists under the provisions of Title 28, United States Code, Section 1332. That plaintiff is a citizen and resident of the State of New York; that each [17] of the defendants is a citizen of one of the States of the United

States other than the State of New York; that the amount in controversy exclusive of interest and costs exceeds the sum of $3,000.00.

II.

That at all times mentioned herein plaintiff has been and now is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business in said State, and authorized to engage in and engaging in the business of issuing policies of life insurance and kindred kinds of insurance, both in the State of New York and in the State of California.

III.

That defendant Alleen S. Mildren was formerly the wife of Paul Mildren, the insured named and designated in the five policies of insurance hereinafter mentioned, and is a citizen and resident of the State of California.

That defendants Donald L. Mildren and Paul Mildren, Jr., are the sons of said insured, Paul Mildren, and the aforesaid defendant Alleen S. Mildren and are each citizens and residents of the State of California; that said defendants Donald L. Mildren and Paul Mildren, Jr., are each over sixteen years of age and that each of said defendants has now attained his majority and is twenty-one years of age or more.

IV.

That Paul Mildren, the insured under each of the five hereinafter mentioned policies of insurance, and

sometimes hereinafter referred to as the "insured," died on or about July 21, 1954, in the City of Los Angeles, County of Los Angeles, State of California. That on the dates hereinafter in this paragraph IV set forth plaintiff issued to the said Paul Mildren as the insured plaintiff's policies of insurance numbered and described as follows, [18] to wit:

Policy No.	Policy Type	Date	Original Face Amount
3,373,875	Ordinary Life	10/22/24	$ 2,500.00
3,377,665	Ordinary Life	10/30/24	2,500.00
3,708,187	Ordinary Life	10/11/26	3,000.00
5,448,542	Endowment Annuity	12/28/38	10,000.00
5,586,988	Endowment Annuity	2/19/40	3,125.00

That by rider dated 2/8/43 described in Endowment Annuity Policy number 5,448,542 said policy was converted into a reduced paid up Annuity Endowment policy in the face amount of $2,476.00.

That by reason of dividend accruals the face amount of policies numbered 3,373,875, 3,377,665, 3,708,187 and 5,586,988 has been increased as follows:

Policy No.	Increased Face Amount
3,373,875	$ 2,505.78
3,377,665	2,505.78
3,708,187	3,008.62
5,586,988	3,138.56

That in and by the terms of said policies and each of them it was agreed that there would be paid to the designated beneficiary named in each of said policies, upon receipt by plaintiff of due proof of the death of the insured (and, in the case of Endow-

ment Annuity policies numbers 5,448,542 and 5,586,-988, upon receipt of due proof in respect to each of said two policies that such death occurred prior to the due date of the first Life Income Payment proceeds to be paid under each of said policies on December 28, 1960, and February 19, 1961, respectively), the face amounts payable under each of said policies, said respective face amounts to be payable in the manner and amounts and upon the terms, provisions and contingencies provided in said respective policies or in Modes of Settlement attached to said policies respectively and forming a part thereof. [19]

V.

That the beneficiary originally named in said policy No. 3,373,875 was William Mildren, referred to therein as the father of said insured. That on or about January 10, 1935, said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy that, in the event defendant Donald L. Mildren survived said insured and was over sixteen years of age at the date of death of said insured, the proceeds of said policy of insurance should be paid in monthly installments of $50.00 each, so long as said proceeds should suffice, first to said defendant Donald L. Mildren during his lifetime, then to defendant Paul Mildren, Jr., during his lifetime, then to defendant Alleen S. Mildren during her lifetime, then to the executors or administrators of the last survivor.

VI.

That the beneficiary originally named in said Ordinary Life policy of insurance No. 3,377,665 was Jessie Wood, referred to therein as the mother of said insured; that said Jessie Wood is one and the same person as Jessie Mildren, one of the named defendants herein. That on or about October 16, 1939, said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy of insurance that, in the event defendant Paul Mildren, Jr., survived said insured and was over sixteen years of age at the date of death of said insured, the proceeds of said policy of insurance should be paid in equal monthly installments for a period of four years certain, first to said defendant Paul Mildren, Jr., during his lifetime, then to defendant Donald L. Mildren during his lifetime, and that following the death of defendant Donald L. Mildren during said four-year period the surrender value of any remaining unpaid installments should be paid to [20] defendant Alleen S. Mildren, if living, otherwise to the executors or administrators of defendant Donald L. Mildren.

VII.

That the beneficiary originally named in said Ordinary Life policy of insurance No. 3,708,187 was defendant Alleen S. Mildren, referred to therein as the wife of said insured. That on or about January 10, 1935, said designation of beneficiary was cancelled and said insured directed and provided in

effect by Mode of Settlement attached to and forming a part of said policy of insurance that in the event defendant Alleen S. Mildren survived said insured, the proceeds of said policy of insurance should be paid to said defendant Alleen S. Mildren in equal monthly installments for twenty years certain and continuing during her lifetime, and that in the event said defendant Alleen S. Mildren should die prior to the payment of all payments certain, any remaining payments certain should be paid as and when due to such of the insured's children as should then be living, equally, and that at the death of the last survivor of said children, the commuted value of any remaining payments certain should be paid to the executors or administrators of such last survivor.

VIII.

That the beneficiary originally named in said Endowment Annuity policy of insurance No. 5,448,542 was defendant Alleen S. Mildren, if living, otherwise defendants Donald L. Mildren and Paul Mildren, Jr., share and share alike, or the survivor of them. That on or about February 21, 1939, said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy of insurance that in the event defendant Alleen S. Mildren survived said insured, the proceeds of said policy of insurance should be paid to said defendant Alleen S. Mildren in monthly installments of $50.00 each so long as said proceeds should suffice, during her [21] lifetime, and after her death

should be paid to said insured's children, defendants Donald L. Mildren and Paul Mildren, Jr., or to the survivor of them, all upon the contingencies and in the manner more specifically set forth in said Mode of Settlement.

IX.

That the beneficiary originally named in said Endowment Annuity policy of insurance No. 5,586,988 was defendant Alleen S. Mildren, if living, otherwise defendants Donald L. Mildren and Paul Mildren, Jr., equally, share and share alike, or the survivor of them.

X.

That on or about April 8, 1953, in that certain divorce action in the Superior Court of the State of California, in and for the County of San Bernardino, entitled "Alleen S. Mildren, Plaintiff and Cross-Defendant, vs. Paul Mildren, Defendant and Cross-Complainant" and numbered 68261 in the files and records of said Court, an interlocutory decree of divorce was made and entered adjudging and decreeing that defendant Alleen S. Mildren was entitled to a divorce from said insured Paul Mildren. That said interlocutory decree provided in relevant part as follows:

"4. That the defendant and cross-complainant be and he is hereby awarded as his sole and separate property the following:

* * *

"(b) Life insurance policies.

* * *

"5. That each of the parties be and they are hereby ordered to deliver to the other any of the real or personal property in the possession of the person or party other than the one to whom the same is herein awarded."

That the final decree of divorce in said divorce action [22] was made and entered on or about April 12, 1954; that said final decree continued in effect the provisions of said interlocutory decree with respect to the division of property between the parties to said divorce action, to wit, defendant Alleen S. Mildren and said insured, and specifically the portions of said interlocutory decree quoted hereinabove in this paragraph X.

XI.

Pursuant to said interlocutory and final divorce decrees, the insured Paul Mildren made several demands on defendant Alleen S. Mildren to deliver said insurance policies but she continued to fail and refuses to deliver them, all in violation of and contrary to the terms of said interlocutory divorce decree. On the application of the insured, the Superior Court of the State of California, in and for the County of San Bernardino, in said proceeding No. D68261, did on January 13, 1954, issue its Order to Show Cause why defendant Alleen S. Mildren should not be punished for contempt for wilfully disobeying the said Order contained in the said interlocutory divorce decree. A trial was had before said Court on the issues raised in said Order to

Show Cause on January 25 and 26, 1954, and at the conclusion of said trial the matter was taken under submission by the Court and on May 7, 1954, said Court caused its findings of fact to be filed containing the following language:

"Plaintiff has in her possession the following described life insurance policies which were awarded to defendant in the interlocutory judgment of divorce rendered herein and which now belong solely and exclusively to defendant and to which he is entitled to possession:

> #397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Donald Lee Mildren,
>
> #399418, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Paul Mildren, Jr., [23]
>
> Five policies #3,373,875, 3,377,665, 3,708,187, 5,448,542, 5,586,988 in The Mutual Life Insurance Company of New York on life of Paul Mildren, Sr."

On May 7, 1954, pursuant to the said findings of fact, the said Court caused its Order to be filed and entered in Book 125 at page 189 in the record of judgments of said Court containing the following language:

"Plaintiff is guilty of contempt because of her failure to deliver possession of the following described insurance policies to defendant and plain-

tiff is hereby ordered to deliver the following described policies to defendant as his sole and separate property or in the alternative to deliver them to the Clerk of the above-entitled Court to be held until this order becomes final either by lapse of time or on decision on appeal:

> "#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Donald Lee Mildren,
>
> "#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Paul Mildren, Jr.,
>
> "Five policies, #3,373,875, 3,377,665, 3,708,187, 5,448,542, 5,586,988, in The Mutual Life Insurance Company of New York, on life of Paul Mildren, Sr.

Upon the delivery of said policies to defendant, Plaintiff will be purged of her contempt."

Pursuant to said order, demand was made on Attorney Taylor F. Peterson who was representing defendant Alleen S. Mildren for said policies and said demand was refused. On May 14, 1954, attorney for the insured placed in the hands of the Sheriff of San Bernardino County a certified copy of the said order on defendant Alleen S. Mildren. On June 21, 1954, the said Sheriff returned the said certified copy of the said order to insured's attorney and made his return in the following words: [24]

"That after due search and diligent inquiry I have been unable to find the within named defendant Alleen S. Mildren (evading service, unable to contact)."

No appeal has been taken from said order and the time for taking an appeal has expired. The said order has never been cancelled, withdrawn or modified and is still in full force and effect and defendant Alleen S. Mildren continued to refuse to comply with said order and continued to withhold said policies in violation of said order right up to the time of the death of the insured.

XII.

That on or about June 17, 1953, said insured executed and there was thereafter furnished to plaintiff a further and additional request for change of beneficiary under said five policies of insurance and each of them, and therein, in said request for change of beneficiary, said insured designated as his intended beneficiary under each of said policies of insurance defendant Jessie Mildren, described in said request for change of beneficiary as the mother of said insured.

XIII.

That each of said policies of insurance contained a rider or other provision providing in effect, among other things, that the right to change the beneficiary thereunder was reserved solely to the insured, to the exclusion of the beneficiary, and that any change of beneficiary thereunder should be effective

only upon endorsement of the same on such policy of insurance by plaintiff. That the aforesaid changes of beneficiary referred to hereinabove in paragraphs V through IX, inclusive, are each properly endorsed on the respective policies of insurance in said paragraphs V through IX described, but that the change of beneficiary referred to in Paragraph XII hereinabove has never been endorsed on any of said policies of insurance by reason of said insured's failure to [25] submit said policies to plaintiff whether at the time of requesting said change of beneficiary, or otherwise, for the purpose of permitting plaintiff to endorse said change of beneficiary thereon; that said insured's failure to submit said policies of insurance for endorsement of said last mentioned change of beneficiary was due to the fact that said policies of insurance were not at the time of such requested change in the possession or under the control of said insured, but were in the possession or under the control of defendant Alleen S. Mildren and were wrongfully and in violation of the said interlocutory decree and Court order described in paragraphs X and XI of this cross-complaint withheld from said insured by said defendant Alleen S. Mildren.

XIV.

The aforesaid interlocutory and final decrees of divorce and the said Court order set forth in paragraph XI herein were valid and effective to constitute said insured the sole owner of said five policies of insurance as his separate property; the aforesaid change of beneficiary referred to in paragraph

XII hereinabove was valid and effective to change the beneficiary under each of said policies of insurance.

That defendant Jessie Mildren claims that said interlocutory and final decrees of divorce and said Court order and said change of beneficiary referred to in paragraph XII hereinabove were each valid and effective, and that accordingly said defendant Jessie Mildren is the sole beneficiary under said five policies of insurance and each of them and is entitled to receive payment of the entire proceeds thereof; that said defendant Jessie Mildren has demanded payment to her by plaintiff of the entire proceeds payable under each of said policies of insurance.

Wherefore, defendant and cross-complainant Jessie Mildren prays:

1. That the said insured Paul Mildren was at the time [26] of his death the sole owner of all of said policies as his separate property and that the change of beneficiary alleged in paragraph XII hereof was valid and effective to change the beneficiary under each of said policies of insurance to defendant and cross-complainant Jessie Mildren and that defendant and cross-complainant Jessie Mildren is entitled to the proceeds and death benefits of all of said policies.

2. That the Court order the Clerk of this Court to pay the proceeds of all of said policies, which have been deposited with said Clerk, to defendant Jessie Mildren.

3. That the defendant Alleen S. Mildren be ordered and decreed to deliver up and surrender said five policies of insurance, together with all endorsements thereto, to the Clerk of this Court for endorsement in respect to any valid change of beneficiary not yet endorsed on any of said policies.

4. That upon final hearing the said defendants, and each of them, their agents, attorneys, representatives and all persons claiming by, through or under them, or either of them, may be perpetually enjoined and restrained from instituting or prosecuting any suit or proceeding or any action or actions in any state Court or in any other federal Court, or in any other Court of law or equity, against any other defendant herein on account of said policies of life insurance numbered 3,373,875, 3,377,665, 3,708,187, 5,448,542, and 5,586,988 issued on the life of Paul Mildren or the monies payable thereunder.

5. That cross-complainant Jessie Mildren do have such other, further, different and additional and general relief as to the Court may seem just and equitable in the premises.

/s/ ROBERT McWILLIAMS,
Attorney for Defendant and Cross-Complainant Jessie Mildren.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed October 19, 1954. [27]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT
(Declaratory Relief and Interpleader)

Jessie Mildren answering plaintiff's complaint on file herein for herself alone admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs I, II and III except that this answer defendant denies that there are any claimants who claim any interest in or to the proceeds of any of the said life insurance policies with the exception of Alleen S. Mildren, Donald L. Mildren, Paul Mildren, Jr., and Jessie Mildren.

II.

Admits the allegations contained in Paragraphs IV, V, VI, VII, VIII, IX, X, XI and XII. [29]

III.

In aswer to Paragraph XIII admits that defendant Jessie Mildren claims that said interlocutory and final decrees of divorce and said change of beneficiary referred to in Paragraph XI of plaintiff's complaint were each valid and effective and that accordingly said defendant Jessie Mildren is sole beneficiary under said five policies of insurance and each of them and is entitled to receive payment of the entire proceeds thereof, that said defendant Jessie Mildren has demanded payment to her by plaintiff of the entire proceeds payable under each of said policies of insurance. Except

as expressly admitted, this answering defendant lacks sufficient information or belief to enable her to answer the allegations of Paragraph XIII and basing her denial on that ground denies both generally and specifically each and every allegation contained therein.

IV.

This answering defendant admits the allegations contained in Paragraphs XIV, XV, XVI, and XVII.

Wherefore, this answering defendant Jessie Mildren prays:

1. That the defendants may be decreed to litigate and settle among themselves their rights or claims to the proceeds payable under said policies of insurance and deposited in court as alleged in plaintiff's complaint.

2. That this court determine the validity and priority of the respective claims of defendants and each of them and the obligations of plaintiff and adjudicate and direct the disposition of any amounts payable under or with respect to any or all of said policies of insurance in accordance with the terms and provisions thereof, and subject to the prior payment of plaintiff's costs, expenses and attorneys' fees.

3. That except as otherwise expressly adjudicated by decree of this court, plaintiff be released and discharged of and [30] from any and all obligations or liability under or arising out of or with

respect to said policies of insurance, or any of them, or any provisions thereunder.

4. That the defendant Alleen S. Mildren be ordered and decreed to deliver up and surrender said five policies of insurance together with all endorsements thereto to the Clerk of this court for endorsement in respect to any valid change of beneficiary not yet endorsed on any of said policies.

5. That except as may be herein ordered by this court upon final hearing, the said defendants, and each of them, their agents, attorneys, representatives, and all persons claiming by, through or under them or either of them may be perpetually enjoined and restrained from instituting or prosecuting any suit or proceeding or any action or actions in any State court or in any other Federal court or in any other court of law or equity against plaintiff or any of said defendants on account of said policies of life insurance numbered 3,373,875, 3,373,-665, 3,708,187, 5,448,542 and 5,886,988 issued on the life of Paul Mildren or the monies payable thereunder.

6. That this answering defendant have such other, further, different and additional and general relief as to this court may seem just and equitable in the premises.

/s/ ROBERT McWILLIAMS,
Attorney for Defendant Jessie Mildren.

Affidavit of service by mail attached.
[Endorsed]: Filed October 19, 1954. [31]

[Title of District Court and Cause.]

CROSS-COMPLAINT OF ALLEEN S. MILDREN TO RECOVER PROCEEDS OF POLICIES

Comes now Alleen S. Mildren, defendant herein, and for a cross-complaint against the defendant, Jessie Mildren, alleges:

I.

That jurisdiction of this Court exists under the provisions of Title 28, United States Code, Section 1332. That plaintiff is a citizen and resident of the State of New York; that each of the defendants is a citizen of one of the States of the United States other than the State of New York; that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. [33]

II.

That heretofore, to wit, on the 22nd day of September, 1954, the plaintiff hereinabove named filed its complaint in the office of the Clerk of the above-entitled Court, and likewise deposited with the Clerk of said Court the proceeds of the life insurance policies hereinafter described, prayed that it be relieved of liability upon such deposit in Court, and that the parties defendant be decreed to litigate among themselves their rights, titles, and interests of, in, and to the insurance policies in said complaint described.

III.

Alleges that this cross-complainant is the former wife of the deceased, Paul Mildren, named in the policies in said complaint and hereinafter described as the insured under and by virtue of each of said policies of insurance.

IV.

That the defendant and cross-defendant, Jessie Mildren, is the mother of said deceased, Paul Mildren, is the mother-in-law of cross-complainant, and is the grandmother of the defendants, Donald L. Mildren and Paul Mildren Jr.

V.

That heretofore, to wit, on or about the 15th day of September, 1950, there was commenced in the Superior Court of the State of California, in and for the County of San Bernardino, a certain suit or action entitled Alleen S. Mildren, Plaintiff, vs. Paul Mildren, Defendant; that the said Paul Mildren named therein as defendant, was and is the same person described as Paul Mildren in plaintiff's complaint on file herein, and in this answer as the insured under the policies of insurance hereinafter set forth; that said action was numbered 68261 upon the files of said Superior Court. [34]

VI.

That said divorce action, number 68261, was prosecuted to final judgment in the above-entitled Superior Court; that under and by virtue of the terms of the judgment entered therein, there was awarded

to the said Paul Mildren "life insurance policies"; that no other or further designation in said Interlocutory Judgment of Divorce as to life insurance policies was contained in said decree.

VII.

That in the cross-complaint of said Paul Mildren, filed in said divorce action as aforesaid, it was alleged, under oath by the said Paul Mildren, now deceased, that the parties to said action owned and possessed as community property the following "C-Life insurance policies;" that said life insurance policies were not in said cross-complaint designated with any greater particularity than as hereinabove set forth; and that said cross-complaint and said Interlocutory Judgment of Divorce were and each of them was so vague and indefinite as to be void for uncertainty and totally unenforceable, so far as the possession and/or ownership of said life insurance policies was and is concerned.

VIII.

That said Interlocutory Judgment of Divorce was not appealed, vacated, set aside, nor modified in whole or in part; that a final judgment of divorce was entered in the said divorce action on or about the 12th day of April, 1954, and that said final judgment of divorce did not, by or in any of its terms, change, alter, or modify any of the terms of said Interlocutory Judgment of Divorce.

IX.

That each of the policies of insurance described and designated in plaintiffs' complaint on file herein

contained a provision providing in effect, among other things, that the right to change the beneficiary thereunder was reserved solely to the insured to the exclusion of the or any beneficiary, and that any change of beneficiary thereunder should be effective only upon an endorsement [35] of the same on such policy of insurance by plaintiff; that changes of beneficiaries as set forth in plaintiff's complaint in Paragraphs Five, Six, Seven, and Eight thereof, were endorsed upon the said life insurance policies by the plaintiff as is set forth in plaintiff's complaint.

X.

This defendant and cross-complainant is informed and believes and therefore avers the fact to be that some time after the 17th day of June, 1953, the said Paul Mildren, now deceased, sent to the plaintiff a request for change of beneficiary, wherein and whereby said deceased, Paul Mildren, attempted to change the beneficiary upon the policies described in plaintiff's complaint, wherein this defendant and cross-complainant was named as beneficiary in each of such policies, but that the said deceased did not forward to the plaintiff the policies of life insurance described in plaintiff's complaint, and this defendant and cross-complainant avers that the attempted change of beneficiary as to each of such policies, by the said deceased, Paul Mildren, was and is void and of no force and/or effect.

As and for a Second Separate and Distinct Cause of Action This Defendant and Cross-Complainant Alleges:

I.

That at the time and place when and where the said deceased, Paul Mildren, made or attempted to make a change of beneficiary as to the life insurance policies described in plaintiff's complaint, the said Paul Mildren was not then and there of sound mind, but that said deceased, Paul Mildren, was then and there incompetent by reason of mental and bodily infirmities to do or transact any business whatever.

Wherefore this defendant and cross-complainant prays:

1. That the purported change of beneficiary, alleged to have been made by the deceased, Paul Mildren, at some date subsequent [36] to the 17th day of January, 1953, be declared to be null and void and of no effect.

2. That it be adjudged by this Court that this defendant and cross-complainant is entitled to receive the proceeds of said policies, numbers 3708187, 5448542, 5886988 in accordance with the terms and provisions of said policies of insurance.

3. That it be adjudged that the cross-defendant, Jessie Mildren, has no right, title, or interest of, in, or to any of said policies and/or to any of the proceeds and/or avails thereof.

4. That defendant and cross-complainant, Alleen

S. Mildren, have such other and further relief as the nature of the case may require.

5. That she have and recover her costs of suit herein incurred.

/s/ TAYLOR S. PETERSON,
Attorney for Defendant and
Cross-Complainant.

Affidavits of service by mail attached.

[Endorsed]: Filed October 28, 1954. [37]

[Title of District Court and Cause.]

CROSS-COMPLAINT OF DONALD L. MILDREN TO RECOVER PROCEEDS OF POLICY

Comes now Donald L. Mildren, defendant herein, and for a cross-complaint against the defendant, Jessie Mildren, alleges:

I.

That jurisdiction of this Court exists under the provisions of Title 28, United States Code, Section 1332. That plaintiff is a citizen and resident of the State of New York; that each of the defendants is a citizen of one of the States of the United States other than the State of New York; that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. [39]

II.

That heretofore, to wit, on the 22nd day of September, 1954, the plaintiff hereinabove named filed its complaint in the office of the Clerk of the above-entitled Court, and likewise deposited with the Clerk of said Court the proceeds of the life insurance policies hereinafter described, prayed that it be relieved of liability upon such deposit in Court, and that the parties defendant be decreed to litigate among themselves their rights, titles, and interests of, in, and to the insurance policies in said complaint described.

III.

Alleges that this cross-complainant is the son of the deceased, Paul Mildren.

IV.

That the defendant and cross-defendant, Jessie Mildren, is the grandmother of the defendant and cross-complainant.

V.

That heretofore, to wit, on or about the 15th day of September, 1950, there was commenced in the Superior Court of the State of California in and for the County of San Bernardino, a certain suit or action entitled Alleen S. Mildren, Plaintiff, vs. Paul Mildren, Defendant; that the said Paul Mildren named therein as defendant, was and is the same person described as Paul Mildren in plaintiff's complaint on file herein, and in this answer as the insured under the policies of insurance hereinafter

set forth; that said action was numbered 68261 upon the files of said Superior Court.

VI.

That said divorce action, number 68261, was prosecuted to final judgment in the above-entitled Superior Court; that under and by virtue of the terms of the judgment entered therein, there was awarded to the said Paul Mildren "life insurance policies"; that no [40] other or further designation in said Interlocutory Judgment of Divorce as to life insurance policies was contained in said decree.

VII.

That in the cross-complaint of said Paul Mildren, filed in said divorce action as aforesaid, it was alleged, under oath by the said Paul Mildren, now deceased, that the parties to said action owned and possessed as community property the following, "C-Life Insurance Policies;" that said life insurance policies were not in said cross-complaint designated with any greater particularity than as hereinabove set forth; and that said cross-complaint and said Interlocutory Judgment of Divorce were and each of them was so vague and indefinite as to be void for uncertainty and totaly unenforceable, so far as the possession and/or ownership of said life insurance policies was and is concerned.

VIII.

That said Interlocutory Judgment of Divorce was not appealed, vacated, set aside, nor modified in

whole or in part; that a final judgment of divorce was entered in the said divorce action on or about the 12th day of April, 1954, and that said final judgment of divorce did not, by or in any of its terms, change, alter, or modify any of the terms of said Interlocutory Judgment of Divorce.

IX.

That each of the policies of insurance described and designated in plaintiff's complaint on file herein contained a provision providing in effect, among other things, that the right to change the beneficiary thereunder was reserved solely to the insured to the exclusion of the or any beneficiary, and that any change of beneficiary thereunder should be effective only upon an endorsement of the same on such policy of insurance by plaintiff; that changes of beneficiaries as set forth in plaintiff's complaint in Paragraphs Five, Six, Seven, and Eight thereof, were endorsed upon the said life insurance policies by the plaintiff as is set [41] forth in plaintiff's complaint.

X.

This defendant and cross-complainant is informed and believes and therefore avers the fact to be that some time after the 17th day of June, 1953, the said Paul Mildren, now deceased, sent to the plaintiff a request for change of beneficiary, wherein and whereby said deceased, Paul Mildren, attempted to change the beneficiary upon the policies described in plaintiff's complaint, wherein this defendant and cross-complainant was named as ben-

eficiary in one of said policies, to wit, number 3,373,875, and as a contingent beneficiary in the other policies described in plaintiff's complaint, but that the said deceased did not forward to the plaintiff the policies of life insurance described in plaintiff's complaint, and this defendant and cross-complainant avers that the attempted change of beneficiary as to each of such policies, by the said deceased, Paul Mildren, was and is void and of no force and/or effect.

As and for a Second Separate and Distinct Cause of Action this Defendant and Cross-Complainant Alleges:

I.

That at the time and place when and where the said deceased, Paul Mildren, made or attempted to make a change of beneficiary as to the life insurance policies described in plaintiff's complaint, the said Paul Mildren was not then and there of sound mind, but that said deceased, Paul Mildren, was then and there incompetent by reason of mental and bodily infirmities to do or transact any business whatever.

Wherefore this defendant and cross-complainant prays:

1. That the purported change of beneficiary, alleged to have been made by the deceased, Paul Mildren, at some date subsequent to the 17th day of January, 1953, be declared to be null and void and of no effect.

2. That it be judged by this Court that this defendant [42] and cross-complainant is entitled to receive the proceeds of said policy number 3,373,875 in accordance with the terms and provisions of said policy of insurance, and that this defendant and cross-complainant is the contingent beneficiary named in the other policies of insurance described in plaintiff's complaint, and is entitled to receive the proceeds or a part thereof in the event the contingencies specified in said policy occur.

3. That it be adjudged that the cross-defendant, Jessie Mildren, has no right, title, or interest of, in, or to any of said policies and/or to any of the proceeds and/or avails thereof.

4. That defendant and cross-complainant, Donald L. Mildren have such other and further relief as the nature of the case may require.

5. That he have and recover his costs of suit herein incurred.

/s/ TAYLOR F. PETERSON,
Attorney for Defendant and Cross-Complainant,
Donald L. Mildren.

Affidavits of service by mail attached.

[Endorsed]: Filed October 28, 1954. [43]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT ALLEEN S. MILDREN

Comes now the defendant, Alleen S. Mildren, and answering the complaint of plaintiff on file herein, admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraphs One and Two of said complaint.

II.

Answering the allegations contained in Paragraph Three of said complaint, this defendant admits those portions thereof contained in lines ten to twenty-one, page two of said complaint, inclusive, and alleges that the defendants, Donald L. Mildren and Paul Mildren, Jr., are and each of them is over the age of twenty-one years; having no knowledge, information, or belief sufficient to enable her to answer the allegations contained in said Paragraph Three, page two of said complaint, lines twenty-two to thirty-two, inclusive, and basing her denial upon that ground, this defendant denies each and every allegation [47] contained in lines twenty-two to thirty-two, page two, Paragraph Three of said complaint.

III.

Admits the allegations contained in Paragraphs Four and Five of said complaint.

IV.

Admits the allegations contained in Paragraph Six of said complaint.

V.

Admits the allegations contained in Paragraphs Seven, Eight, Nine, and Ten of said complaint.

VI.

This answering defendant has no knowledge, information, or belief sufficient to enable her to answer the allegations contained in Paragraph Eleven of said complaint, and basing her denial upon that ground, denies generally and specifically each and every allegation contained in said Paragraph Eleven.

VII.

Answering the allegations in Paragraph Twelve of said complaint, this answering defendant admits each and every allegation contained in said Paragraph, commencing with line twenty-six, page seven of said complaint, to and including the words "policies of insurance" on line four, page eight, of said complaint; denies generally and specifically each and every other allegation contained in said Paragraph Twelve of said complaint.

VIII.

Answering the allegations contained in Paragraph Thirteen of said complaint, this defendant admits those parts or portions thereof commencing at line four, page nine, of said complaint, and ending with the words "said policies," on line twenty-

four, page nine of said complaint; admits the allegations contained in that part or portion of said Paragraph Thirteen, commencing on line twenty-five [48] page nine of said complaint, to and including the word, "thereof," on line three, page ten of said complaint; having no knowledge, information, or belief sufficient to enable her to answer the remaining allegations contained in said Paragraph Thirteen of said complaint, and basing her denial upon that ground, this defendant denies the allegations contained in said Paragraph Thirteen, commencing on line four, page ten of said complaint, ending with the words, "a part thereof," on line twelve of said complaint; admits the allegations contained in Paragraph Thirteen of said complaint, commencing with the words "that by reason," on line thirteen, page ten of said complaint, and continuing through the remainder of said paragraph on line twenty-four of said complaint.

IX.

Admits the allegations contained in Paragraphs Fourteen, Fifteen, and Sixteen of said complaint.

X.

Admits the allegations contained in Paragraph Seventeen of said complaint.

Wherefore this answering defendant prays that the above-entitled Court determine the controversy existing between the respective claimants to said policies, in accordance with law and in accordance

with the cross-complaint of this answering defendant, served and filed herewith.

/s/ TAYLOR F. PETERSON,
Attorney for Said Defendant,
Alleen S. Mildren.

Affidavits of service by mail attached.

[Endorsed]: Filed October 28, 1954. [49]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT DONALD L. MILDREN

Comes now the defendant, Donald L. Mildren, and answering the complaint of plaintiff on file herein, admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraphs One and Two of said complaint.

II.

Answering the allegations contained in Paragraph Three of said complaint, this defendant admits those portions thereof contained in lines ten to twenty-one, page two of said complaint, inclusive, and alleges that the defendants, Donald L. Mildren and Paul Mildren Jr., are and each of them is over the age of twenty-one years; having no knowledge, information, or belief sufficient to enable him to answer the allegations contained in said Paragraph

Three, page two of said complaint, lines twenty-two to thirty-two, inclusive, and basing his denial upon that ground, this defendant denies [53] each and every allegation contained in lines twenty-two to thirty-two, page two, Paragraph Three of said complaint.

III.

Admits the allegations contained in Paragraphs Four and Five of said complaint.

IV.

Admits the allegations contained in Paragraph Six of said complaint.

V.

Admits the allegations contained in Paragraphs Seven, Eight, Nine, and Ten of said complaint.

VI.

This answering defendant has no knowledge, information, or belief sufficient to enable him to answer the allegations contained in Paragraph Eleven of said complaint, and basing his denial upon that ground, denies generally and specifically each and every allegation contained in said Paragraph Eleven.

VII.

Answering the allegations in Paragraph Twelve of said complaint, this answering defendant admits each and every allegation contained in said Paragraph, commencing with line twenty-six, page seven of said complaint, to and including the words, "policies of insurance," on line four, page eight of

said complaint; denies generally and specifically each and every other allegation contained in said Paragraph Twelve of said complaint.

VIII.

Answering the allegations contained in Paragraph Thirteen of said complaint, this defendant admits those parts or portions thereof commencing at line four, page nine, of said complaint, and ending with the words, "said policies," on line twenty-four, page nine of said complaint; admits the allegations contained in that part or portion of said Paragraph Thirteen, commencing on line [54] twenty-five, page nine of said complaint, to and including the word, "thereof," on line three, page ten of said complaint; having no knowledge, information, or belief sufficient to enable him to answer the remaining allegations contained in said Paragraph Thirteen of said complaint, and basing his denial upon that ground, this defendant denies the allegations contained in said Paragraph Thirteen, commencing on line four, page ten of said complaint, ending with the words, "a part thereof," on line twelve of said complaint; admits the allegations contained in Paragraph Thirteen of said complaint, commencing with the words, "that by reason," on line thirteen, page ten of said complaint, and continuing through the remainder of said Paragraph on line twenty-four of said complaint.

IX.

Admits the allegations contained in Paragraphs Fourteen, Fifteen, and Sixteen of said complaint.

X.

Admits the allegations contained in Paragraph Seventeen of said complaint.

Wherefore this answering defendant prays that the above-entitled Court determine the controversy existing between the respective claimants to said policies, in accordance with law and in accordance with the cross-complaint of this answering defendant, served and filed herewith.

/s/ TAYLOR F. PETERSON,
Attorney for Said Defendant,
Donald L. Mildren.

Affidavits of service by mail attached.

[Endorsed]: Filed October 28, 1954. [55]

[Title of District Court and Cause.]

ANSWER OF ALLEEN S. MILDREN AND DONALD L. MILDREN TO CROSS-COMPLAINT OF JESSIE MILDREN

Come now the defendants and cross-defendants, Alleen S. Mildren and Donald L. Mildren, and answering the cross-complaint of Jessie Mildren, on file herein, admit, deny, and allege as follows, to wit:

I.

Admit the allegations contained in Paragraphs One to Ten, [59] inclusive, of said complaint.

II.

Answering the allegations contained in Paragraph Eleven of said cross-complaint, these defendants admit that the defendant and cross-defendant, Alleen S. Mildren, has in her possession the policies of life insurance described in plaintiff's complaint, in her cross-complaint, and in the cross-complaint of the said cross-defendant and cross-complainant, Jessie Mildren; deny that the same is in violation of and/or contrary to the terms of the Interlocutory Decree of Divorce; admit that the Superior Court of the State of California, in and for the County of San Bernardino, did issue an Order to Show Cause directed to the defendant, cross-defendant, and cross-complainant, Alleen S. Mildren; admit that the Court filed Findings of Fact, containing the language alleged in said Paragraph Eleven, line twenty-four, page seven, to and including line three, page eight of said cross-complaint; admit the allegations contained in said Paragraph Eleven, page eight, lines four to twenty-four, inclusive thereof; allege that said Order so made as aforesaid was beyond the jurisdiction of said Superior Court to make, in that it purports to order certain described policies of insurance to be delivered by the defendant, cross-defendant, and cross-complainant, Alleen S. Mildren, whereas said Interlocutory Decree of Divorce contained no language identifying any specific policies of insurance these cross-defendants; having no knowledge, information, or belief sufficient to enable them to answer the same, and basing their denial upon that ground, deny that

any demand was made upon Taylor F. Peterson for any of the policies described in plaintiff's complaint on file herein and likewise described in these answering defendants' separate answers and cross-complaints; allege that the said policies so described as aforesaid have at all times been in the possession and under the control of the said Alleen S. Mildren; having no knowledge sufficient to enable them to answer [60] the allegations contained in commencing on line twenty-seven, page eight, of said cross-complaint, beginning with the words "on May 14, 1954," and to and including the end of line three, page nine, of said cross-complaint, and basing their denial upon that ground, these defendants deny each and every allegation therein contained; admit that no appeal has been taken from said Order; deny that said Order is in full force and effect and aver that the same is void; deny that the said Alleen S. Mildren holds said policies in violation of any valid Order.

III.

Having no knowledge, information, and/or belief sufficient to enable them to answer the allegations of Paragraph Twelve of said cross-complaint, and basing their denial upon that ground, these defendants, cross-defendants, and cross-complainants deny each and every allegation contained in said Paragraph Twelve.

IV.

Answering the allegations contained in Paragraph Thirteen of said cross-complaint, these defendants, cross-defendants, and cross-complainants

admit the allegations contained in said Paragraph, commencing on line twenty-one thereof and ending with the words "said policies of insurance" on line thirty-two of said page nine of said cross-complaint; deny generally and specifically, except as hereinabove specifically admitted, each and every allegation set forth in said Paragraph Thirteen.

V.

Answering the allegations contained in said Paragraph Fourteen of said cross-complaint, these defendants, cross-defendants, and cross-complainants deny each and every allegation therein contained.

Wherefore these defendants, cross-defendants, and cross-complainants pray that cross-complainant, Jessie Mildren, take nothing by reason of her cross-complaint and that these defendants, [61] cross-defendants, and cross-complainants have judgment as prayed for in their cross-complaints on file herein.

/s/ TAYLOR F. PETERSON,
Attorney for Said Defendants, Cross-Defendants, and Cross-Complainants.

[Endorsed]: Filed November 3, 1954. [62]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF DONALD L. MILDREN TO RECOVER PROCEEDS OF POLICY

In answer to cross-complainant Donald L. Mildren's cross-complaint, cross-defendant Jessie Mildren admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs I, II, III, IV, V, VI.

II.

In answer to Paragraph VII alleges that said interlocutory [66] judgment of divorce was valid and enforceable. Except as alleged, denied both generally and specifically each and every allegation contained in Paragraph VII.

III.

The Superior Court of the State of California in and for the County of San Bernardino in the said divorce action entitled Alleen S. Mildren vs. Paul Mildren, case No. D 68261, after the hearing on an order to show cause why Alleen S. Mildren should not be punished for contempt made and filed its Findings of Fact on May 7, 1954 in said action which provides in part as follows:

"Plaintiff has in her possession the following described life insurance policies which were awarded to defendant in the interlocutory judgment of di-

vorce rendered herein and which now belong solely and exclusively to defendant and to which he is entitled to possession:

"#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren,

"#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Paul Mildren, Jr.

"Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988 in The Mutual Life Insurance Company of New York on life of Paul Mildren, Sr."

In the same action and pursuant to said Findings, the court made and filed its Order on May 7, 1954, which was entered on May 7, 1954, in Book 125, Page 189 of Judgments in the said court which provided in part as follows:

"Plaintiff is guilty of contempt because of her failure to deliver possession of the following described insurance policies to defendant and plaintiff is hereby ordered to deliver the following described policies to defendant as his sole and separate property or in the alternative to deliver them to the Clerk of the above [67] entitled court to be held until this order becomes final either by lapse of time or on decision on appeal:

"#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren,

"#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.

"Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988, in The Mutual Life Insurance Company of New York on life of Paul Mildren, Sr."

Upon the delivery of said policies to defendant, plaintiff will be purged of her contempt."

Said Findings of Fact and Order have never been changed, modified or set aside and no appeal has been taken therefrom and the time for taking an appeal has now expired. Except as expressly alleged, admits all of the allegations contained in Paragraph VIII.

IV.

Admits the allegations contained in Paragraph IX.

V.

In answer to Paragraph X, alleges that at the time said request for change of beneficiary was filed with the plaintiff, The Mutual Life Insurance Company of New York, cross-complainant Alleen S. Mildren was in possession of said policies and refused after demand made upon her to turn them over to the decedent, Paul Mildren, and for that reason the said Paul Mildren was prevented from and was unable to send the said policies to the plaintiff to have the change of beneficiary endorsed thereon. Alleges that the said change of beneficiary as to each of said policies was valid and binding and enforceable. Except as expressly alleged, admits all of the allegations contained in Paragraph X.

Answer to Second Cause of Action

I.

Denies each and every allegation contained in Paragraph I [68] and alleges that the deceased Paul Mildren was at all times mentioned in said cross-complaint of sound mind.

Wherefore, Jessie Mildren, this answering cross-defendant prays that cross-complainant Donald L. Mildren take nothing by his cross-complaint and that the proceeds of said life insurance policies be awarded to cross-defendant Jessie Mildren, together with her costs of suit and such other relief as to the court seems just.

/s/ ROBERT McWILLIAMS,
Attorney for Cross-Defendant
Jessie Mildren.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 3, 1954. [69]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF ALLEEN S. MILDREN TO RECOVER PROCEEDS OF POLICIES.

Cross-defendant Jessie Mildren answering cross-complainant Alleen S. Mildren's cross-complaint on file herein admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs I, II, III, IV, V and IX.

II.

In answer to Paragraph VII alleges that the said interlocutory judgment of divorce was valid and enforceable. Except as [71] alleged, denies both generally and specifically each and every allegation contained in Paragraph VII.

III.

The Superior Court of the State of California in and for the County of San Bernardino in the said divorce action entitled Alleen S. Mildren vs. Paul Mildren, case No. D 68261, after the hearing on an order to show cause why Alleen S. Mildren should not be punished for contempt made and filed its Findings of Fact on May 7, 1954 in said action which provides in part as follows:

"Plaintiff has in her possession the following described life insurance policies which were awarded to defendant in the interlocutory judgment of divorce rendered herein and which now belong solely and exclusively to defendant and to which he is entitled to possession:

> "#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren,
>
> "#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.,

"Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988 in The Mutual Life Insurance Company of New York on life of Paul Mildren, Sr."

In the same action and pursuant to said Findings, the court made and filed its Order on May 7, 1954, which was entered on May 7, 1954, in Book 125, Page 189 of Judgments, in the said court which provided in part as follows:

"Plaintiff is guilty of contempt because of her failure to deliver possession of the following described insurance policies to defendant and plaintiff is hereby ordered to deliver the following described policies to defendant as his sole and separate property or in the alternative to deliver them to the Clerk of the above entitled court to be held until this order becomes [72] final either by lapse of time or on decision on appeal:

"#397674A1, Lincoln National Life Insurance company of Fort Wayne, Ind., on Life of Donald Lee Mildren,

"#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.,

"Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988, in The Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.

Upon the delivery of said policies to defendant, plaintiff will be purged of her contempt."

Said Findings of Fact and Order have never been changed, modified, or set aside and no appeal has been taken therefrom and the time for taking an appeal has now expired. Except as expressly alleged, admits all of the allegations contained in Paragraph VIII.

IV.

In answer to Paragraph X, alleges that at the time said request for change of beneficiary was filed with the plaintiff, The Mutual Life Insurance Company of New York, cross-complainant Alleen S. Mildren was in possession of said policies and refused after demand made upon her to turn them over to the decedent, Paul Mildren, and for that reason the said Paul Mildren was prevented from and was unable to send the said policies to the plaintiff to have the change of beneficiary endorsed thereon. Alleges that the said change of beneficiary as to each of said policies was valid and binding and enforceable. Except as expressly alleged, admits all of the allegations contained in Paragraph X.

Answer to Second Cause of Action

I.

Denies each and every allegation contained in Paragraph I and alleges that the deceased Paul Mildren was at all times mentioned in said cross-complaint of sound mind.

Wherefore, Jessie Mildren, this answering cross-defendant [73] prays that cross-complainant Alleen S. Mildren take nothing by her cross-complaint and that the proceeds of said life insurance policies be awarded to cross-defendant Jessie Mildren, together

with her costs of suit and such other relief as to the court seems just.

/s/ ROBERT McWILLIAMS,
Attorney for Cross-Defendant
Jessie Mildren.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 3, 1954. [74]

United States District Court, Southern District of California, Central Division

Civil Action No. 17253-WB

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

ALLEEN S. MILDREN, et al.,

Defendants.

JESSIE MILDREN,

Cross-Complainant,

vs.

ALLEEN S. MILDREN, et al.,

Cross-Defendants.

ORDER DISCHARGING PLAINTIFF AND FOR PAYMENT OF ATTORNEYS' FEES AND COSTS

Pursuant to the stipulation of all parties hereto, filed herein on January 6, 1955, and the court having

read and considered the same and being fully advised,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the allegations in paragraphs I to X, inclusive, [90] and XIV to XVII, inclusive, of plaintiff's complaint are true. That plaintiff's complaint for declaratory relief and interpleader on file in the above entitled action is properly filed. That defendants Alleen S. Mildren, Donald Lee Mildren, Paul Mildren, Jr. and Jessie Mildren constitute each and all of the parties claiming or subject to claiming an interest in or to the proceeds of or amounts payable under or by virtue of those certain ordinary life insurance policies and endowment annuity policies issued by plaintiff to Paul Mildren as insured, and more particularly described in paragraph IV of plaintiff's complaint, to wit, ordinary life policies Nos. 3,373,875 and 3,377,665, and those certain endowment annuity policies Nos. 3,708,187, 5,448,542 and 5,586,988. That each of said four defendants above named have appeared and filed an answer herein.

2. That the full face amount plus dividend accruals, constituting the entire proceeds of policy No. 5,586,988, was and is the sum of $3,138.56, and the full face amount plus dividend accruals, constituting the entire proceeds of policies Nos. 3,373,875, 3,377,665, 3,708,187 and 5,448,542, was and is the sum of $10,496.18. That the aforesaid sums of $3,138.56 and $10,496.18 have heretofore at the time of filing the complaint herein been paid by plaintiff

into the registry of this court and at all times subsequent thereto have been and still remain on deposit in said registry.

3. That defendants, and each of them, are hereby enjoined and restrained during the pendency of this action from assigning or transferring to any person or persons any claim which they or any of them may have with respect to said five policies of insurance, or any of them, or any provisions thereof or any proceeds thereof.

4. That subject to the contingencies hereinafter in paragraph 6 mentioned and set forth, said policies of insurance shall be and they hereby are cancelled and terminated and adjudged and decreed to be of no further force or effect, and that plaintiff shall be and is hereby released and discharged of and from any and [91] all obligations or liability, and of and from any and all claims and demands of whatsoever nature of each of the defendants appearing herein and the assigns, personal representatives and successors in interest of each of them, under or arising out of or with respect to said above numbered and described policies of insurance or the proceeds thereof, or any benefit, interest or equity therein or thereunder, or any provision thereof. That except as may be herein ordered by this court upon final hearing the said defendants, and each of them, their agents, attorneys, representatives and all persons claiming by, through or under them, or either of them, shall be perpetually enjoined and restrained from instituting or prosecuting any suit or proceeding or any action or actions in this or any other federal or state court, against plaintiff based upon any

of said policies of insurance numbered 3,373,875, 3,377,665, 3,708,187, 5,448,542 and 5,586,988, or the moneys payable thereunder.

5. That defendants herein, and each of them, be and they are hereby ordered and required to plead and litigate among themselves concerning their respective claims under or arising out of or with respect to said policies of insurance, or the proceeds thereof, or any benefit, interest or equity therein or thereunder, or any provision thereof.

6. That in the event it is determined by this court that the attempted or purported change of beneficiary mentioned and described in paragraph XI of plaintiff's complaint is invalid or ineffective, then in such event, following the deduction and payment to plaintiff of its costs of suit and reasonable attorneys' fees herein, the final judgment herein shall order and provide that the proceeds, inclusive of dividend accruals, of policies numbered 3,373,875, 3,377,665, 3,708,187 and 5,448,542 shall be returned to plaintiff by the clerk of this court for payment by plaintiff in installment payments to the person or persons adjudicated by this court to be entitled thereto pursuant to the income settlement [92] provisions contained in the Modes of Settlement made a part of said four policies.

7. That the final judgment herein shall direct and order that the defendant or defendants having possession thereof deliver up and surrender the said five policies of insurance involved herein, together with all endorsements thereto, to plaintiff for endorsement in respect to any valid change of bene-

ficiary not yet endorsed on any of said policies and, subject to the contingency hereinabove mentioned in paragraph 6 of this order pertaining to the four policies therein specified, so that plaintiff may mark and indicate on all of said policies that all further liability of plaintiff thereunder has been terminated and extinguished. That if the said defendants are unable to deliver up said five policies of insurance for any reason whatsoever, that the final judgment and decree herein shall provide and confirm that (subject to the contingency in paragraph 6 of this order set forth with respect to the four policies therein specified) said policies of insurance or any thereof not delivered up as aforesaid have been fully paid and cancelled and otherwise are of no further force or effect. That as a condition to the payment to any person or persons who may be adjudged to be entitled to any amount payable under the above described policies, or any of them, plaintiff shall be permitted to make application to this court for the purpose of causing a provision to be inserted in said final judgment providing for such additional protection or security as may be deemed proper in the premises in order to assure and protect plaintiff from being obliged or called upon to pay any further or additional amount or amounts whatsoever in respect to any policy or policies aforementioned which for any reason are not surrendered to plaintiff prior to the payment of the proceeds thereof adjudicated by this court to be payable thereunder to the person or persons found to be entitled thereto.

8. That the clerk of this court shall pay from the moneys [93] deposited by plaintiff into the registry

of this court unto Newlin, Holley, Tackabury & Johnston, attorneys for plaintiff herein, the sum of $19.50, constituting plaintiff's costs of suit herein incurred, and the sum of $750.00 which is hereby found to constitute a reasonable attorneys' fee herein and which is hereby awarded to plaintiff.

9. That jurisdiction of this action is retained by this court for determination of the respective rights of defendants in and to the insureds' proceeds and funds involved herein.

10. That the final judgment herein shall be submitted for approval as to form to plaintiff as well as to each of the other parties hereto.

Dated: January 7, 1955.

/s/ WM. M. BYRNE,
Judge.

Approved as to form pursuant to Rule 7:

NEWLIN, HOLLEY, TACKABURY & JOHNSTON,

By /s/ GEORGE W. TACKABURY,
Attorneys for Plaintiff.

/s/ ROBERT McWILLIAMS,
Attorney for Defendant Jessie Mildren.

/s/ TAYLOR F. PETERSON,
Attorney for Defendants Alleen S. Mildren and Donald L. Mildren.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS,

By /s/ A. M. ROGERS, JR.,
Attorneys for Defendant Paul
Mildren, Jr.

[Endorsed]: Filed January 7, 1955.

Judgment docketed and entered January 7, 1955.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

At a conference held under Rule 16 F. R. C. P. by direction of Honorable William M. Byrne, Judge, the following admissions and agreements of fact were made by the parties and require no proof:

(1) The insured, Paul Mildren, is the son of Jessie Mildren; the father of Donald L. Mildren and Paul Mildren Jr.; and was the husband of Alleen S. Mildren until the marriage was dissolved by divorce.

(2) A divorce action was filed by Alleen S. Mildren, as plaintiff, against the said Paul Mildren, in the Superior Court of the State of California, in and for the County of San Bernardino, Action No. 68261, on September 20, 1950, an Interlocutory decree of [116] Divorce was made and entered in said action on April 8, 1953, in Judgment Book 121, Page 75, and which contained in part the following language:

There is hereby set aside and awarded to the defendant and cross-complainant as his sole and separate property:

(a) The trailer.

(b) Life insurance policies.

(c) Cash in the sum of $7800.00.

"5. That each of the parties be and they are hereby ordered to deliver to the other any of the real or personal property in the possession of the person or party other than the one to whom the same is herein awarded."

(3) A final decree of divorce was made and entered in said divorce action on April 12, 1954, in Book 125, Page 28 of Judgments.

(4) On December 2, 1953, in said divorce action at the request of Paul Mildren, an order to show cause why Alleen S. Mildren should not be punished for contempt for her failure, among other things, to turn over to Paul Mildren the following described insurance policies was issued by the Superior Court of San Bernardino County:

#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren.

#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren Jr.,

Five policies, #3373,875—3377,665—3708,187—5448,542—5586,988, in the Mutual Life Insur-

ance Company of New York on life of Paul Mildren Sr.

Said order to show cause was served on Alleen S. Mildren on December 4, 1953, by a deputy of the Sheriff of the County of San Bernardino.

(5) A certified copy of the said interlocutory decree in said divorce action was served on Alleen S. Mildren by the Sheriff's [117] office of San Bernardino County on December 23, 1953.

(6) On January 13, 1954, in said divorce action at the request of Paul Mildren, the Court issued an order to show cause why Alleen S. Mildren should not be punished for contempt for her failure to turn over to Paul Mildren the following described life insurance policies:

#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren,

#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.,

Five policies, #3373,875—3377,665—3708,187—5448,542—5586,988, in the Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.

(7) Said order to show cause issued on January 13, 1954, was served by the Sheriff's office of San Bernardino County on Alleen S. Mildren on January 14, 1954.

(8) A trial was held before said Superior Court on January 25 and 26, 1954, at which time some four separate matters were heard by the Court. These included:

1. An action brought in claim and delivery by Alleen S. Mildren against Paul Mildren and Jessie Mildren to recover certain personal property, said to have been converted by Paul Mildren and Jessie Mildren to their own use, which resulted in a judgment in favor of the defendants.

2. An action for forceable detainer for waste and for value of use and occupation of premises brought by Alleen S. Mildren against Paul Mildren and Jessie Mildren, which resulted in a judgment in favor of the defendants.

3. An action to enjoin and restrain the Sheriff of San Bernardino County from proceeding to sell certain property of the plaintiff Alleen S. Mildren, which had been levied upon by the Sheriff in an attempt to enforce the provisions of the [118] judgment referred to hereinabove, wherein and whereby the defendant Paul Mildren was awarded cash in the sum of $7800.00. A judgment in favor of the defendant in that action followed.

4. A proceeding in contempt based on the order to show cause hereinabove set forth and which resulted in the issuance of an order in action No. 68261 as follows:

"Plaintiff is guilty of contempt because of her failure to deliver possession of the following de-

scribed insurance policies to defendant and plaintiff is hereby ordered to deliver the following described policies to defendant as his sole and separate property or in the alternative to deliver them to the Clerk of the above entitled court to be held until this order becomes final either by lapse of time or on decision on appeal:

> "#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren,
>
> "#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.,
>
> "Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988, in The Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.

Upon the delivery of said policies to defendant, plaintiff will be purged of her contempt."

(9) No service of said order was ever made upon the said Alleen S. Mildren.

(10) There was executed by the said Paul Mildren and introduced in evidence in said action No. 68261, a deed and property settlement agreement wherein said Paul Mildren transferred to the said Alleen S. Mildren all property contained in the home property which was then located at 346 North Mango Street, Fontana, California, and which has

now been re-numbered 8208 Mango Street, Fontana, California.

(11) The Findings of Fact signed and filed in connection [119] with the trial of said order to show cause on May 7, 1954 by the Superior Court of the State of California, in and for the County of San Bernardino, in the said divorce action found among other things:

"Plaintiff (Alleen S. Mildren) has in her possession the following described life insurance policies which were awarded to defendant (Paul Mildren) in the interlocutory judgment of divorce rendered herein and which now belong solely and exclusively to the defendant (Paul Mildren) and to which he is entitled to possession:

> "#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren,
>
> "#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.,
>
> "Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988 in The Mutual Life Insurance Company of New York on life of Paul Mildren, Sr."

(12) All of the judgments, decrees and orders referred to in said divorce action have become final and none of them have ever been appealed, vacated or modified in any way.

(13) On or about April 12, 1954, Robert McWilliams as attorney for the said Paul Mildren, wrote and delivered through the United States mail to Attorney Taylor F. Peterson a letter in the following words:

"Dear Mr. Peterson:

"As I understand your last letter, the only part of the decision made by Judge Curtis which you are contesting is the one with reference to the unlawful detainer action.

"I assume, therefore, that you will be willing to turn over the life insurance policies to me for Dr. Mildren. [120]

"If I am correct, please let me know how you want to handle this, if you want to mail them to me or just how you want them delivered.

"Very truly yours,"

(14) The said Attorney Taylor F. Peterson on or about April 19, 1954, wrote and delivered through the mail to the said Robert McWilliams a letter as follows:

"Dear Mr. McWilliams:

"This will acknowledge receipt of your letter dated April 12, 1954.

"I do not have the life insurance policies in my possession. Mrs. Mildren has, and she has not as yet given me instructions as to what she wished me to do. After judgment has been entered and Notice of Entry of Judgment is sent me, it will probably be necessary for me to consult with her again to see

whether she desires to file Notice of Intention to move for a new trial, or to appeal or whether she intends to comply with the order.

"With regard to the matter of the personal property, I instructed Mrs. Mildren to have it delivered to the Fontana Van & Storage Company, trailer included, and for Fontana Van & Storage Company, in turn, to notify you or Dr. Mildren when the property had been received by them. This will, I think, take care of this situation.

"Thank you for your courtesy in this matter, I am

"Very truly yours,"

(15) On or about June 17, 1953, the said Paul Mildren executed and delivered to The Mutual Life Insurance Company of New York written requests for change of beneficiaries, requesting that the beneficiaries on all policies involved in this suit be changed to Jessie Mildren as the mother of the insured. [121]

Issues of Fact to Be Tried

(1) Whether or not there was any evidence taken before the Superior Court at the trials held on January 25th and 26th, 1954, from which a court could find that any insurance policies were transferred to the said Paul Mildren under and by virtue of the interlocutory final judgments of divorce in action No. 68261.

(2) Whether or not the life insurance policies, which are the subject of the present action were included in the personal property in the house at 346 North Mango Street, Fontana, California at the

time and place when and where the property settlement agreement was entered into.

(3) Whether or not the life insurance policies which are the subject of the present action were delivered by Paul Mildren, deceased, to Alleen S. Mildren contemporaneously with the execution and delivery of a certain written agreement dated January 28, 1948, and formed a part of the same transaction.

(4) Was any evidence taken at the trial on January 25 and 26, 1954, in the said divorce action as to the said order to show cause.

(5) On May 18, 1954, was a certified copy of the order made on the trial of the order to show cause referred to on page 4, lines 4 to 22, hereof given to the Sheriff's Office of San Bernardino County by the said Paul Mildren for the purpose of serving it on Alleen S. Mildren, and on June 21, 1954, did the said Sheriff's Office make a return as follows:

"Sheriff's Office
"County of San Bernardino—ss.

"I, Eugene L. Mueller, Sheriff of the County of San Bernardino, hereby certify that I received the within Order on the 18th day of May, 1954, and that after due search and diligent inquiry I have been unable to find the within named defendant Alleen S. Mildren [122] (Evading service, unable to contact) in San Bernardino County.

"Dated June 21st, 1954.

"/s/ EUGENE L. MUELLER,
"Sheriff.

"By JOHN BROZAN,
"Deputy Sheriff."

(6) On August 10, 1954, did David T. Harshman make an affidavit of service of said order made on the trial of the said order to show cause certifying that he served the said order on Alleen S. Mildren August 10, 1954? Was service effected?

Issues of Law

(1) Were the insurance policies, which are the subject of the present action, delivered and transferred by Paul Mildren, deceased, to Alleen S. Mildren so that title to said policies passed to her on or about January 28, 1948?

(2) Did the interlocutory and final decrees and the Order made on trial of the orders to show cause in action No. 68261 in the Superior Court of the State of California in and for the County of San Bernardino operate to transfer title to the policies of insurance which are the basis of the present action to the said Paul Mildren?

(3) In the event that the decree did not transfer title to any policies to the defendant Paul Mildren, were the policies community property? Were they paid for from earnings of the parties, namely Alleen S. Mildren and Paul Mildren, and as to the

cross-defendant Donald L. Mildren, did the policy in his favor pass to him upon the death of his father?

(4) In the event the court finds that the decree of divorce did not transfer title to the policies to Paul Mildren, did Paul Mildren make a valid gift of his one-half interest in the policies to his mother Jessie Mildren? [123]

(5) Is Alleen S. Mildren entitled to all the proceeds of the policies because of the fact that no change of beneficiary was ever effected?

(6) Was the attempted change of beneficiary on all of said policies invalid because of the failure to endorse on the policy contract such changes?

(7) Did the Mutual Life Insurance Company of New York, plaintiff herein, waive the requirement that a change of beneficiary should be attached to and endorsed upon the policies by filing this interpleader suit?

(8) Was the requirement of attaching the request for change of beneficiary to the insurance policies excused because the policies were not available and could not be obtained by the insured Paul Mildren?

Dated: May 2, 1955.

/s/ WM. M. BYRNE,
Judge of the U. S. District Court.

The foregoing pre-trial order is hereby approved:

/s/ ROBERT McWILLIAMS,
Attorney for Cross-Complainant Jessie Mildren.

/s/ TAYLOR F. PETERSON,
Attorney for Cross-Defendants Alleen S. Mildren and Donald L. Mildren.

WOOD, CRUMP, ROGERS, ARNDT & EVANS.

By /s/ A. M. ROGERS, JR.,
Attorney for Cross-Defendant Paul Mildren, Jr.

[Endorsed]: Filed May 2, 1955. [124]

[Title of District Court and Cause.]

MINUTES OF THE COURT

MAY 31, 1955

Present: Hon. Wm. M. Byrne, District Judge.

Proceedings:

For trial. At 9:50 A.M. court convenes herein, and Court orders trial proceed.

Alleen S. Mildren is called, sworn, and testifies for cross-defendants.

Cross-Def'ts' Ex. A is received in evidence.

Cross-Complainants Jessie Mildren's Ex. 1 is received in evidence.

Melbourne S. Hamilton is called, sworn, and testifies for cross-Def'ts.

Cross-Def'ts' Ex. B is received in evidence. (Photo-copies to be substituted).

Donald Lee Mildren, Edith V. Maycock, and Wm. Augustus Bell, respectively, are called, sworn, and testify for cross-defendants.

Attorney McWilliams objects to testimony of Witness Bell as immaterial.

At 10:55 A.M. court recesses. At 11:10 A.M. court reconvenes herein, and all being present as before.

Cross-Complainant's Ex. 2 and 3 are admitted in evidence.

Witness Hamilton resumes the stand and testifies re missing Exhibit E in Superior Court file.

Court states counsel may have a continuance to locate said exhibit.

Clerk Hamilton, in charge of file, is excused until June 1, 1955, and Court instructs that photo-copies of documents in Superior Court file be made today and returned to Court June 1, 1955.

Cross-complainant rests but reserves right to introduce Exhibit E.

Cross-defendant rests subject to introduction of said Exhibit E.

It is ordered that cause is continued to June 1, 1955, 9:45 A.M., for further trial.

JOHN A. CHILDRESS,
Clerk. [125]

[Title of District Court and Cause.]

MINUTES OF THE COURT

JUNE 1, 1955

Present: Hon. Wm. M. Byrne, District Judge.

Proceedings:

For further trial. At 9:55 A.M. Court orders trial proceed.

Attorney McWilliams makes a statement re missing Exhibit E. Court and counsel confer re photostat copies ordered from Superior Court file. Court states that in accordance with stipulation, the documents ordered will be substituted as soon as the Clerk of the Superior Court has produced same from file and that at that time the Superior Court file will be released to the Clerk.

Counsel stipulate that original insurance policies may be withdrawn and copies substituted, and it is so ordered.

Court orders case continued to 2 P.M., unless photostat copies are available before then.

At 10:05 A.M. court recesses. At 11:30 A.M. court reconvenes herein, and all being present as before, including counsel for both sides, Court orders trial proceed.

Cross-Complainant's Ex. 4 is admitted in evidence.

Cross-Defendants' Ex. C is admitted in evidence.

Court orders said file of the Superior Court withdrawn and that it not be a part of the record herein, and that documents copied from said file and introduced herein are the only ones admitted in evidence.

Court orders said file returned to the Clerk of the Superior Court.

Both sides rest.

It is ordered that cause be submitted on briefs to be filed 10x10x5, cross-complainant to file first.

Attorney Rogers makes a statement to the Court re interest of Paul Mildren, Jr., and Court makes a statement re ruling on policies of insurance.

At 11:50 A.M. court adjourns.

JOHN A. CHILDRESS,
Clerk. [126]

[Title of District Court and Cause.]

MINUTES OF THE COURT

OCTOBER 27, 1955,

Present: Hon. Wm. M. Byrne, District Judge;

Proceedings:

For settlement of the findings of fact, conclusions of law and judgment.

Attorney Peterson argues in support of the objections of defendants Alleen S. Mildren and Donald L. Mildren to the form of findings and conclusions proposed by defendant Jessie Mildren.

Attorney McWilliams argues in opposition to said objections.

It is ordered that said objections are sustained, except as to objection V, which is withdrawn by

Attorney Peterson; Attorney McWilliams to prepare and present revised findings of fact and conclusions of law, pursuant to said ruling. [165]

JOHN A. CHILDRESS,

By /s/ L. B. FIGG,
Deputy Clerk.

[Title of District Court and Cause.]

FINDINGS OF FACT IN FAVOR OF CROSS-COMPLAINANT JESSIE MILDREN

Plaintiff having paid into the registry of this court the sum of $13,634.74, which is the total fund in controversy and said sum being still on deposit in said registry and plaintiff having been discharged by order of this court entered pursuant to stipulation of all parties, and a pre-trial order having been signed by Robert McWilliams as attorney for cross-complainant, Jessie Mildren; by Taylor F. Peterson as attorney for cross-complainants Alleen S. Mildren and Donald L. Mildren; and by Wood, Crump, Rogers, Arndt & [166] Evans by A. M. Rogers, Jr., as attorneys for defendant Paul Mildren, Jr., and filed herein whereby certain stipulations of fact, stated therein, were agreed upon and the case being called for trial on May 31, 1955, at the hour of 9:45 a.m., in courtroom 4 before William M. Byrne, judge presiding, sitting without a jury, a jury having been expressly waived, and Robert McWilliams appearing as attorney for

cross-Complainant Jessie Mildren and Taylor F. Peterson appearing as attorney for cross-complainants Alleen S. Mildren and Donald L. Mildren and Wood, Crump, Rogers, Arndt & Evans by A. M. Rogers, Jr., appearing as attorneys for defendant Paul Mildren, Jr., and cross-complainants Jessie Mildren, Alleen S. Mildren and Donald L. Mildren being present in court and evidence both oral and documentary having been introduced on behalf of cross-complainants Jessie Mildren, Alleen S. Mildren and Donald L. Mildren, and the court having considered the same and having received and read briefs by counsel for cross-complainants Jessie Mildren, Alleen S. Mildren and Donald L. Mildren and being fully advised, makes the following findings of fact:

I.

That jurisdiction of this court exists under the provisions of Title 28, United States Code, Section 1332. That plaintiff is a citizen and resident of the State of New York; that each of the defendants is a citizen of one of the States of the United States other than the State of New York; that the amount in controversy exclusive of interest and costs exceeds the sum of $3,000.00.

II.

That at all times mentioned herein plaintiff has been and now is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business in said State, and authorized to engage in and en-

gaging in the business of issuing policies of life insurance and kindred [167] kinds of insurance, both in the State of New York and in the State of California.

III.

That defendant Alleen S. Mildren was formerly the wife of Paul Mildren, the insured named and designated in the five policies of insurance hereinafter mentioned, and is a citizen and resident of the State of California.

That defendants Donald L. Mildren and Paul Mildren, Jr., are the sons of said insured, Paul Mildren, and the aforesaid defendant Alleen S. Mildren and are each citizens and residents of the State of California; that said defendants Donald L. Mildren and Paul Mildren, Jr., are each over sixteen years of age and that each of said defendants has now attained his majority and is twenty-one years of age or more.

IV.

That Paul Mildren, the insured under each of the five hereinafter mentioned policies of insurance, and sometimes hereinafter referred to as the "insured," died on or about July 21, 1954, in the City of Los Angeles, County of Los Angeles, State of California. That on the dates hereinafter in this paragraph IV set forth plaintiff issued to the said Paul Mildren as the insured plaintiff's policies of insurance numbered and described as follows, to wit:

Policy No.	Policy Type	Date	Original Face Amount
3,373,875	Ordinary Life	10/22/24	$ 2,500.00
3,377,665	Ordinary Life	10/30/24	2,500.00
3,708,187	Ordinary Life	10/11/26	3,000.00
5,448,542	Endowment Annuity	12/28/38	10,000.00
5,586,988	Endowment Annuity	2/19/40	3,125.00

That by rider dated 2-8-43 described in Endowment Annuity Policy number 5,448,542 said policy was converted into a reduced paid up Annuity Endownment policy in the face amount of [168] $2,-476.00.

That by reason of dividend accruals the face amount of policies numbered, 3,373,875, 3.377,665, 3,708,187 and 5,586,988 has been increased as follows:

Policy No.	Increased Face Amount
3,373,875	$ 2,505.78
3,377,665	2,505.78
3,708,187	3,008.62
5,586,988	3,138.56

That in and by the terms of said policies and each of them it was agreed that there would be paid to the designated beneficiary named in each of said policies, upon receipt by plaintiff of due proof of the death of the insured (and, in the case of Endowment Annuity policies numbers 5,448,542 and 5,586,988, upon receipt of due proof in respect to each of said two policies that such death occurred prior to the due date of the first Life Income Payment proceeds to be paid under each of said policies on December 28, 1960 and February 19, 1961, respectively), the face amounts payable under each

of said policies, said respective face amounts to be payable in the manner and amounts and upon the terms, provisions and contingencies provided in said respective policies or in Modes of Settlement attached to said policies respectively and forming a part thereof.

V.

That the beneficiary originally named in said policy No. 3,373,875 was William Mildren, referred to therein as the father of said insured. That on or about January 10, 1935 said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy that, in the event defendant Donald L. Mildren survived said insured and was over sixteen years of age at the date of death of said insured, the proceeds of said policy of insurance should be paid in monthly installments of $50.00 each, [169] so long as said proceeds should suffice, first to said defendant Donald L. Mildren during his lifetime, then to defendant Paul Mildren, Jr., during his lifetime, then to defendant Alleen S. Mildren during her lifetime, then to the executors or administrators of the last survivor.

VI.

That the beneficiary originally named in said Ordinary Life policy of insurance No. 3,377,665 was Jessie Wood, referred to therein as the mother of said insured; that said Jessie Wood is one and the same person as Jessie Mildren, one of the named defendants herein. That on or about October 16,

1939, said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy of insurance that, in the event defendant Paul Mildren, Jr., survived said insured and was over sixteen years of age at the date of death of said insured, the proceeds of said policy of insurance should be paid in equal monthly installments for a period of four years certain, first to said defendant Paul Mildren, Jr., during his lifetime, then to defendant Donald L. Mildren during his lifetime, and that following the death of defendant Donald L. Mildren during said four-year period the surrender value of any remaining unpaid installments should be paid to defendant Alleen S. Mildren, if living, otherwise to the executors or administrators of defendant Donald L. Mildren.

VII.

That the beneficiary originally named in said Ordinary Life policy of insurance No. 3,708,187 was defendant Alleen S. Mildren, referred to therein as the wife of said insured. That on or about January 10, 1935 said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy of insurance that in the event defendant Alleen S. Mildren [170] survived said insured, the proceeds of said policy of insurance should be paid to said defendant Alleen S. Mildren in equal monthly installments for twenty

years certain and continuing during her lifetime, and that in the event said defendant Alleen S. Mildren should die prior to the payment of all payments certain, any remaining payments certain should be paid as and when due to such of the insured's children as should then be living, equally, and that at the death of the last survivor of said children, the commuted value of any remaining payments certain should be paid to the executors or administrators of such last survivor.

VIII.

That the beneficiary originally named in said Endowment Annuity policy of insurance No. 5,448,542 was defendant Alleen S. Mildren, if living, otherwise defendants Donald L. Mildren and Paul Mildren, Jr., share and share alike, or the survivor of them. That on or about February 21, 1939, said designation of beneficiary was cancelled and said insured directed and provided in effect by Mode of Settlement attached to and forming a part of said policy of insurance that in the event defendant Alleen S. Mildren survived said insured, the proceeds of said policy of insurance should be paid to said defendant Alleen S. Mildren in monthly installments of $50.00 each so long as said proceeds should suffice, during her lifetime, and after her death should be paid to said insured's children, defendants Donald L. Mildren and Paul Mildren, Jr., or to the survivor of them, all upon the contingencies and in the manner more specifically set forth in said Mode of Settlement.

IX.

That the beneficiary originally named in said Endowment Annuity policy of insurance No. 5,586,988 was defendant Alleen S. Mildren, if living, otherwise defendants Donald L. Mildren and Paul Mildren, Jr., equally, share and share alike, or the survivor of them. [171]

X.

That on or about April 8, 1953, in that certain divorce action in the Superior Court of the State of California, in and for the County of San Bernardino, entitled "Alleen S. Mildren, Plaintiff and Cross-Defendant, vs. Paul Mildren, Defendant and Cross-Complainants" and numbered 68261 in the files and records of said court, an interlocutory decree of divorce was made and entered adjudging and decreeing that defendant Alleen S. Mildren was entitled to a divorce from said insured Paul Mildren. That said interlocutory decree provided in relevant part as follows:

"4. That the defendant and cross-complainant be and he is hereby awarded as his sole and separate property the following:

* * *

"(b) Life insurance policies.

* * *

"5. That each of the parties be and they are hereby ordered to deliver to the other any of the real or personal property in the possession of the person or party other than the one to whom the same is herein awarded."

That the final decree of divorce in said divorce action was made and entered on or about April 12, 1954; that said final decree continued in effect the provisions of said interlocutory decree with respect to the division of property between the parties to said divorce action, to wit, defendant Alleen S. Mildren and said insured, and specifically the portions of said interlocutory decree quoted hereinabove in this paragraph X.

XI.

On December 2, 1953, in said divorce action at the request of Paul Mildren, an order to show cause why Alleen S. Mildren should not be punished for contempt for her failure, among other [172] things, to turn over to Paul Mildren the following described insurance policies was issued by the Superior Court of San Bernardino County:

> #397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Donald Lee Mildren,
>
> #399418, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Paul Mildren, Jr.,
>
> Five policies, #3373,875—3377,665—3708,187—5448,542—5586,988, in the Mutual Life Insurance Company of New York on life of Paul Mildren Sr.

Said order to show cause was served on Alleen S. Mildren on December 4, 1953, by a deputy of the Sheriff of the County of San Bernardino.

XII.

A certified copy of the said interlocutory decree in said divorce action was served on Alleen S. Mildren by the Sheriff's office of San Bernardino County on December 23, 1953.

XIII.

On January 13, 1954, in said divorce action at the request of Paul Mildren, the Court issued an order to show cause why Alleen S. Mildren should not be punished for contempt for her failure to turn over to Paul Mildren the following described life insurance policies:

#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Donald Lee Mildren,

#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Paul Mildren, Jr.,

Five policies, #3373,875—3377,665—3708,187—5448,542—5586,988, in the Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.

Said order to show cause issued on January 13, 1954, was served by the Sheriff's office of San Bernardino County on Alleen [173] S. Mildren on January 14, 1954.

XIV.

A trial was held before said Superior Court on January 25, and 26, 1954, at which time some four

separate matters were heard by the Court. These included:

1. An action brought in claim and delivery by Alleen S. Mildren against Paul Mildren and Jessie Mildren to recover certain personal property, said to have been converted by Paul Mildren and Jessie Mildren to their own use, which resulted in a judgment in favor of the defendants.

2. An action for forcible detainer for waste and for value of use and occupation of premises brought by Alleen S. Mildren against Paul Mildren and Jessie Mildren, which resulted in a judgment in favor of the defendants.

3. An action to enjoin and restrain the Sheriff of San Bernardino County from proceeding to sell certain property of the plaintiff Alleen S. Mildren, which had been levied upon by the Sheriff in an attempt to enforce the provisions of the judgment referred to hereinabove, wherein and whereby the defendant Paul Mildren was awarded cash in the sum of $7800.00. A judgment in favor of the defendant in that action followed.

4. A proceeding in contempt based on the order to show cause hereinabove set forth and which resulted in the issuance of an order in action No. 68261 as follows:

"Plaintiff is guilty of contempt because of her failure to deliver possession of the following described insurance policies to defendant and plaintiff

is hereby ordered to deliver the following described policies to defendant as his sole and separate property or in the alternative to deliver them to the Clerk of the above-entitled court to be held until this order becomes final either by lapse of time or on decision on appeal:

> "#39767A1, Lincoln National Life Insurance Company of [174] Fort Wayne, Ind., on life of Donald Lee Mildren,
>
> "#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Paul Mildren, Jr.,
>
> "Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988, in The Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.

Upon the delivery of said policies to defendant, plaintiff will be purged of her contempt."

No service of said order was ever made upon the said Alleen S. Mildren.

XV.

The Findings of Fact signed and filed in connection with the trial of said order to show cause on May 7, 1954, by the Superior Court of the State of California, in and for the County of San Bernardino, in the said divorce action found among other things:

"Plaintiff (Alleen S. Mildren) has in her possession the following described life insurance policies which were awarded to defendant (Paul Mildren) in the interlocutory judgment of divorce rendered herein and which now belong solely and exclusively to the defendant (Paul Mildren) and to which he is entitled to possession:

> "#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Donald Lee Mildren,
>
> "#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind., on life of Paul Mildren, Jr.,
>
> "Five policies, #3373,875—3377,665—3708,-187—5448,542—5586,988 in The Mutual Life Insurance Company of New York on life of Paul Mildren, Sr."

All of the judgments, decrees and orders referred to in said divorce action have become final and none of them have ever been appealed, vacated or modified in any way. [175]

XVI.

On or about April 12, 1954, Robert McWilliams as attorney for the said Paul Mildren, wrote and delivered through the United States mail to Attorney Taylor F. Peterson a letter in the following words:

"Dear Mr. Peterson:

"As I understand your last letter, the only part of the decision made by Judge Curtis which you are

contesting is the one with reference to the unlawful detainer action.

"I assume, therefore, that you will be willing to turn over the life insurance policies to me for Dr. Mildren.

"If I am correct, please let me know how you want to handle this, if you want to mail them to me or just how you want them delivered.

"Very truly yours,"

The said Attorney Taylor F. Peterson on or about April 19, 1954, wrote and delivered through the mail to the said Robert McWilliams a letter as follows:

"Dear Mr. McWilliams:

"This will acknowledge receipt of your letter dated April 12, 1954.

"I do not have the life insurance policies in my possession. Mrs. Mildren has, and she has not as yet given me instructions as to what she wished me to do. After judgment has been entered and Notice of Entry of Judgment is sent me, it will probably be necessary for me to consult with her again to see whether she desires to file Notice of Intention to move for a new trial, or to appeal or whether she intends to comply with the order.

"With regard to the matter of the personal [176] property, I instructed Mrs. Mildren to have it delivered to the Fontana Van & Storage Company, trailer included, and for Fontana Van & Storage Company, in turn, to notify you or Dr. Mildren

when the property had been received by them. This will, I think, take care of this situation.

"Thank you for your courtesy in this matter, I am

"Very truly yours,"

XVII.

On or about June 17, 1953, the said Paul Mildren executed and delivered to The Mutual Life Insurance Company of New York written requests for change of beneficiaries, requesting that the beneficiaries on all policies involved in this suit be changed to Jessie Mildren as the mother of the insured.

XVIII.

That each of said policies of insurance contained a rider or other provision providing in effect, among other things, that the right to change the beneficiary thereunder was reserved solely to the insured, to the exclusion of the beneficiary, and that any change of beneficiary thereunder should be effective only upon endorsement of the same on such policy of insurance by plaintiff. That the aforesaid changes of beneficiary referred to hereinabove in paragraphs V through IX, inclusive, are each properly endorsed on the respective policies of insurance in said paragraphs V through IX described, but that the change of beneficiary referred to in Paragraph XVII hereinabove has never been endorsed on any of said policies of insurance by reason of said insured's failure to submit said pol-

icies to plaintiff whether at the time of requesting said change of beneficiary, or otherwise, for the purpose of permitting plaintiff to endorse said change of beneficiary thereon; that said insured's failure to submit said policies of insurance for endorsement of said last mentioned change of beneficiary was due to the fact that said policies of insurance were not at the [177] time of such requested change in the possession or under the control of said insured, but were in the possession of and under the control of defendant Alleen S. Mildren and were wrongfully and in violation of the said interlocutory decree, final divorce decree, and court order described in paragraphs X to XV inclusive of these findings withheld from said insured by said defendant, Alleen S. Mildren.

XIX.

The aforesaid interlocutory and final decrees of divorce and the said court order set forth in paragraphs X through XV herein were valid and effective to constitute said insured the sole owner of said five policies of insurance as his separate property; the aforesaid change of beneficiary referred to in paragraph XVII hereinabove was valid and effective to change the beneficiary under each of said policies of insurance, and that accordingly said defendant, Jessie Mildren, is the sole beneficiary under said five policies of insurance and each of them and is entitled to receive payment of the entire proceeds thereof; that said defendant, Jessie Mildren has demanded payment to her by plaintiff of the entire

proceeds payable under each of said policies of insurance.

XX.

The said deceased, Paul Mildren, was at all times mentioned in the complaint in this action of sound mind and not acting under any duress or undue influence and was at all of said times mentally competent to perform all acts which it was alleged he performed.

XXI.

Pursuant to stipulation of all parties hereto, it is found that the reasonable value of all the services rendered by the attorneys for plaintiff in this action is the sum of $750.00 and that plaintiff has expended in connection with this action the sum of $19.50 as taxable costs herein. That the aggregate amount of attorney's [178] fees and costs total the sum of $769.50 and should be deducted from the proceeds of the said policies of insurance and paid to the attorneys for plaintiff from and out of the aforesaid monies deposited by plaintiff into the registry of this court.

XXII.

Except as otherwise expressly found, all of the allegations contained in the plaintiff's complaint and in the cross-complaint of Jessie Mildren are true and except as otherwise expressly found, all the allegations contained in the cross-complaints of Alleen S. Mildren and Donald L. Mildren and in the answers of Alleen S. Mildren and Donald L. Mildren

to the plaintiff's complaint and to Jessie Mildren's cross-complaint are false.

Conclusions of Law

From the foregoing facts the court makes the following conclusions of law:

I.

That the Clerk should be ordered to pay to cross-complainant, Jessie Mildren, the balance of the money which was paid into the registry of this court by plaintiff or the net amount of $12,865.24, which net amount constitutes the sum remaining in the hands of the Clerk of this court after the payment of the sum of $769.50 pursuant to order discharging plaintiff and for payment of attorney's fees and costs heretofore on January 7, 1955, made and entered herein.

II.

That plaintiff should be released and discharged of and from any and all obligations or liability under or arising out of or with respect to all the policies of insurance involved in this action or any of the or any provision contained in any of them.

III.

Pursuant to the stipulation of the parties and the terms of the order discharging plaintiff and for payment of attorneys' [179] fees and costs heretofore on January 7, 1955, made and entered herein, under the terms of which said order said five insurance

policies were cancelled and declared to be of no further force and effect as more specifically set forth in said order, the Clerk of this court should be ordered to deliver all five of said insurance policies which were introduced into evidence as cross-complainant's Exhibit "A" to Messrs. Newlin, Holley, Tackabury & Johnston, attorneys for plaintiff in the above-entitled action, such policies each to be marked cancelled by plaintiff in confirmation of the cancellation thereof pursuant to the aforesaid order discharging plaintiff and for payment of attorney's fees and costs therein entered on January 7, 1955, as aforesaid.

IV.

That the defendants and each of them, their agents, attorneys, representatives and all persons claiming by, through or under them, or any of them, should be perpetually enjoined and restrained from instituting or prosecuting any suit or proceeding or any action or actions in any state court or in any other federal court, or in any other court of law or equity against plaintiff or any other defendant herein on account of said policies of life insurance numbered 3373875, 3377665, 3708187, 5448542, and 5586988 issued on the life of Paul Mildren or the money payable thereunder.

Dated: November 29th, 1955.

/s/ WM. M. BYRNE,
Judge. [180]

The foregoing findings of fact and conclusions of law are approved as to form pursuant to local Rule 7.

NEWLIN, HOLLEY, TACKABURY & JOHNSTON,

By /s/ GEORGE W. TACKABURY,
Attorneys for Plaintiff.

/s/ ROBERT McWILLIAMS,
Attorney for Defendant
Jessie Mildren.

/s/ TAYLOR F. PETERSON,
Attorney for Defendants Alleen S. Mildren and Donald L. Mildren.

WOOD, CRUMP, ROGERS, ARNDT & EVANS,

By /s/ A. M. ROGERS, JR.,
Attorneys for Defendant
Paul Mildren, Jr.

[Endorsed]: Filed November 29, 1955. [181]

United States District Court, Southern District of California, Central Division

Civil Action No. 17253-WB

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

ALLEEN S. MILDREN, et al,

Defendants.

JESSIE MILDREN,

Cross-Complainant,

vs.

ALLEEN S. MILDREN, DONALD L. MILDREN, PAUL MILDREN, JR., et al.,

Cross-Defendants.

JUDGMENT IN FAVOR OF CROSS-COMPLAINANT JESSIE MILDREN

Plaintiff having paid into the registry of this Court the sum of $13,634.74, which is the total fund in controversy and said sum being still on deposit in said registry and plaintiff having been discharged by order of this Court entered pursuant to stipulation of all parties, and a pre-trial order having been signed by Robert McWilliams as attorney for cross-complainant Jessie Mildren; by Taylor F. Peterson as attorney for cross-complainants Alleen S. Mildren and Donald L. Mildren; and by Wood, Crump, Rogers, Arndt & [182] Evans by A. M. Rogers, Jr.,

as attorneys for defendant Paul Mildren, Jr., and filed herein whereby certain stipulations of fact, stated therein, were agreed upon and the case being called for trial on May 31, 1955, at the hour of 9:45 a.m., in courtroom 4 before William M. Byrne, judge presiding, sitting without a jury, a jury having been expressly waived, and Robert McWilliams appearing as attorney for cross-complainant Jessie Mildren and Taylor F. Peterson appearing as attorney for cross-complainants Alleen S. Mildren and Donald L. Mildren and Wood, Crump, Rogers, Arndt & Evans by A. M. Rogers, Jr., appearing as attorneys for defendant Paul Mildren, Jr., and cross-complainants Jessie Mildren, Alleen S. Mildren and Donald L. Mildren being present in Court and evidence both oral and documentary having been introduced on behalf of cross-complainants Jessie Mildren, Alleen S. Mildren and Donald L. Mildren, and the Court having considered the same and having received and read briefs by counsel for cross-complainants Jessie Mildren, Alleen S. Mildren and Donald L. Mildren and being fully advised, and the Court having heretofore made and caused to be filed its written findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed:

I.

That the Clerk is hereby ordered to pay to cross-complainant Jessie Mildren the balance of the money which was paid into the registry of this Court by plaintiff or net amount of $12,865.24, which

net amount constitutes the sum remaining in the hands of the Clerk of this Court after the payment of the sum of $769.50 pursuant to order discharging plaintiff and for payment of attorneys' fees and costs heretofore on January 7, 1955, made and entered herein.

II.

That plaintiff is hereby released and discharged of and from any and all obligations or liability under or arising out of [183] or with respect to all the policies of insurance involved in this action or any of them or any provision contained in any of them.

III.

Pursuant to the stipulation of the parties and the terms of the order discharging plaintiff and for payment of attorneys' fees and costs heretofore on January 7, 1955, made and entered herein, under the terms of which said order said five insurance policies were cancelled and declared to be of no further force and effect as more specifically set forth in said order, the Clerk of this Court is hereby ordered to deliver all five of said insurance policies which were introduced into evidence as cross-complainant's Exhibit "A" to Messrs. Newlin, Holley, Tackabury & Johnston, attorneys for plaintiff in the above-entitled action, such policies each to be marked cancelled by plaintiff in confirmation of the cancellation thereof pursuant to the aforesaid order discharging plaintiff and for payment of attorneys' fees and costs therein entered on January 7, 1955, as aforesaid.

IV.

That the defendants and each of them, their agents, attorneys, representatives and all persons claiming by, through or under them, or any of them, are perpetually enjoined and restrained from instituting or prosecuting any suit or proceeding or any action or actions in any state Court or in any other federal Court, or in any other Court of law or equity against plaintiff or any other defendant herein on account of said policies of life insurance numbered 3,373,875, 3,377,665, 3,708,187, 5,448,542, and 5,586,988 issued on the life of Paul Mildren or the money payable thereunder.

Dated: November 29, 1955.

/s/ WM. M. BYRNE,
Judge. [184]

The foregoing judgment is approved as to form in accordance with local Rule 7.

NEWLIN, HOLLEY, TACKABURY & JOHNSTON,

By /s/ ROBERT H. INGRAHAM,
Attorneys for Plaintiff.

ROBERT McWILLIAMS,
Attorney for Defendant
Jessie Mildren.

/s/ TAYLOR F. PETERSON,
Attorney for Defendants Alleen S. Mildren and Donald L. Mildren.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS,

By /s/ A. M. ROGERS, JR.,
Attorneys for Defendant
Paul Mildren, Jr.

Receipt of copy acknowledged.

[Endorsed]: Filed November 29, 1955.

Judgment docketed and entered November 30, 1955. [185]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Alleen S. Mildren and Donald Lee Mildren defendants and cross-defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 30, 1955.

December 23, 1955.

/s/ TAYLOR F. PETERSON,
Attorney for Appellants, Alleen S. Mildren and Donald Lee Mildren.

[Endorsed]: Filed December 27, 1955. [186]

In the United States District Court, Southern District of California, Central Division

Civil Action No. 17253-WB

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

ALLEEN S. MILDREN, DONALD L. MILDREN, PAUL MILDREN, JR., JESSIE MILDREN, et al.,

Defendants.

JESSIE MILDREN,

Cross-Complainant,

vs.

ALLEEN S. MILDREN, DONALD L. MILDREN and PAUL MILDREN, Jr.,

Cross-Defendants.

Honorable Wm. M. Byrne, Judge, Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

NEWLIN, HOLLEY, TACKABURY & JOHNSTON, By

GEORGE W. TACKABURY.

For Defendant and Cross-Complainant Jessie Mildren:

ROBERT McWILLIAMS.

For Defendants and Cross-Defendants Alleen S. Mildren and Donald L. Mildren:
TAYLOR F. PETERSON.

For Defendant and Cross-Defendant Paul Anthony Mildren (Sued herein and sometimes known as Paul Mildren, Jr):
WOOD, CRUMP, ROGERS, ARNDT & EVANS and
A. M. ROGERS, JR.

Tuesday, May 31, 1955—9:45 A.M.

The Court: The clerk will call the calendar.

The Clerk: No. 17253 WB, Civil, The Mutual Life Insurance Company of New York versus Alleen S. Mildren, et al., for trial.

Mr. McWilliams: Ready, your Honor.

Mr. Peterson: Ready for the defendants, Alleen S. Mildren and Donald Lee Mildren.

The Court: Who do you represent?

Mr. McWilliams: I represent Jessie Mildren, your Honor.

The Court: Where is counsel for the cross-defendant Paul Mildren?

Mr. Rogers: I am here, if your Honor please, Mr. Rogers.

The Court: All right. You may proceed.

Mr. Peterson: I will call Mrs. Alleen Mildren.

ALLEEN S. MILDREN

one of the cross-defendants herein, called as a witness on behalf of the cross-defendants, being first duly sworn, testified as follows:

The Clerk: Give me your full name, please.

The Witness: Alleen S. Mildren. [4*]

Direct Examination

By Mr. Peterson:

Q. Mrs. Mildren, you are one of the defendants in this action? A. I am, sir.

Q. And Paul Mildren, Sr., was your husband?

A. Yes, sir.

Q. And he died, I believe, last July, is that correct? A. Yes, sir.

Q. Now, when did you marry Paul Mildren, Sr.?

A. July 23, 1926.

Q. And were there any children born as a result of that marriage? A. Yes, sir.

Q. And their names and present ages?

A. Paul Anthony Mildren, born September 21, 1928; Donald Lee Mildren, born October 31, 1932.

Q. During the time that you and your husband were married, were there any life insurance policies obtained? A. Yes, sir.

Q. Were there other policies, in addition to those that are involved in this proceedings?

A. Personal or otherwise?

Q. I am speaking now of life insurance policies.

A. No. [5]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Alleen S. Mildren.)

Q. Upon the lives of either you or your husband?

A. Yes. There is one other.

Q. Will you tell the court what that policy is, and, if you know, where it is at the present time?

Mr. Rogers: I object to the question on the grounds it is incompetent, irrelevant and immaterial.

The Court: What is the purpose of this, counsel?

Mr. Peterson: I think it goes to the question of the definiteness of the judgment that was rendered in the Superior Court in the divorce action, your Honor.

The Court: What is it you are attempting to prove?

Mr. Peterson: That there were other policies or, at least, another policy in addition to those.

The Court: Another policy on the life of the deceased?

Mr. Peterson: On the decedent, yes.

The Court: The objection is overruled.

Mr. Peterson: My question was, what was that policy and upon whose life and in whose favor?

A. There was one each on the boys and another insurance company, and my husband was the beneficiary for one and me for the other.

Q. Well, was there any other policy, other than the five that are involved that pertain to this case? That is my question.

A. Yes, sir. There was another Mutual Life. [6]

Q. That is the same insurance company that is the plaintiff in this action? A. Yes, sir.

(Testimony of Alleen S. Mildren.)

Q. Upon whose life was that policy?

A. My husband's.

Q. And who is named in it as the beneficiary?

A. I am.

Q. And do you know what became of that policy?

A. Yes, I have it. I can't state it just correctly because I haven't studied the policy, but it is Paul, Jr., and it is a life insurance.

Q. And by Paul, Jr., do you mean he is the beneficiary?

A. No. I am the beneficiary but not until his death.

Q. But not until the death——

A. Of Paul, Jr.

Q. Of Paul, Jr.? A. Yes.

Q. And that policy is in addition to the five that are being here sued upon? A. Yes.

Q. What is the face value of that policy?

A. Oh, I can't just tell you offhand, Mr. Peterson.

Q. Do you know upon what date that policy, to which you have just referred, was issued?

A. Way back, years ago. [7]

Mr. McWilliams: To which I object, your Honor, on the ground that the policy itself is the best evidence.

The Court: Sustained.

Q. (By Mr. Peterson): Now, I call your attention to a date in the month of January, 1948. Did you and your husband sign and execute a document at that time relating to your property rights?

(Testimony of Alleen S. Mildren.)

A. Yes, sir.

Q. Mrs. Mildren, I show you a photostatic certified copy of a document marked "Agreement," of January 28, 1948, and ask you whether or not that was the document that was executed by you and your husband at that date?

Mr. McWilliams: Your Honor, I object to the introduction of this particular document, on the ground that it is immaterial, because it has already been adjudicated in an action in San Bernardino County, the pretrial order outlined various proceedings involved, and I don't think it is at all material because it has been the object of prior adjudication in San Bernardino County, in the Superior Court.

Mr. Peterson: If I may be heard upon that matter, your Honor?

The Court: In what way, why would it not be material in this matter? My recollection of the pretrial order is that it is referred to in the pretrial order. Isn't it?

Mr. McWilliams: It is referred to in the pretrial [8] order.

The Court: Is a copy of it attached to the pretrial order?

Mr. McWilliams: No. It is not. There is no copy of it attached to the pretrial order, but it is referred to in the pretrial order.

The Court: Then, it is very material.

Mr. McWilliams: Well, I don't feel that it is material, because I think that any question of in-

(Testimony of Alleen S. Mildren.)

terpretation of this document or the effect of the document has already been taken care of in a predivorce action in San Bernardino, and, therefore, this document isn't of any effect here, but we have to depend upon the decree rather than the document which was adjudicated in that decree.

The Court: Well, that is another question entirely. You are not taking the position that because there was a property settlement entered into in San Bernardino that it is immaterial to the issues in this case, are you?

Mr. McWilliams: Yes, I am.

The Court: You refer to it in your pretrial order. It is referred to in your pretrial order.

Mr. McWilliams: Well, your Honor, in making up a pretrial order, it is impossible for counsel to agree on what is material and what is immaterial.

The Court: Well, the objection is overruled. Of course, [9] you understand as far as your statement as to the effect of it, I am not saying you are wrong on that, I am not ruling on that at the present time. I am just saying that your objection to its immateriality is overruled.

Mr. Peterson: Mr. Reporter, will you read the question, please?

(Pending question read by the reporter.)

A. Yes, that is.

Mr. Peterson: I offer it in evidence as Defendant Alleen Mildren's first exhibit.

(Testimony of Alleen S. Mildren.)

The Court: It will be received.

The Clerk: Cross-defendants' Exhibit A received in evidence.

(The document referred to was marked Cross-Defendants' Exhibit A and received into evidence.)

Q. (By Mr. Peterson): Now, Mrs. Mildren, at the same time that this document was issued, you may state whether or not the insurance policies that are here involved were in and upon the real property which was then 348 North Mango Street, in Fontana?

Mr. McWilliams: To which I object on the ground that this question of the ownership of the policies has been adjudicated, it is res adjudicata, and whether these policies were on the premises or not is immaterial.

Mr. Rogers: I further object to the question on the [10] ground it is leading and suggestive.

The Court: Now, you have set out here in your pretrial order, which counsel for all parties have signed, as an issue of fact to be tried in this case:

"Whether or not the life insurance policies, which are the subject of the present action, were included in the personal property in the house at 346 North Mango Street, Fontana, California, at the time and place when and where the property settlement agreement was entered into.

"Whether or not the life insurance policies which are the subject of the present action were delivered

(Testimony of Alleen S. Mildren.)

by Paul Mildren, deceased, to Alleen S. Mildren contemporaneously with the execution and delivery of a certain written agreement, dated January 28, 1948, and formed a part of the same transaction."

Now, what is the basis of your objection?

Mr. McWilliams: Well, your Honor, possibly I am wasting time, although I hope not, and possibly I don't understand this pretrial procedure, but, counsel in making up this pretrial order felt that it was a part of it and material. I didn't think it was. There was no opportunity to have the court rule on whether it was or not, so it was impossible to make up a pretrial order unless we put it in as an issue to try. [11]

The Court: Counsel, why do you say there wasn't an opportunity for the court to rule on it? Of course, I would not rule on it when you come in here and agree on it. In other words, regarding these facts which you have outlined in the first portion of the pretrial order, you stipulate and agree to the existence of those facts, and state they require no proof.

Then, you state that the issues of fact which are to be tried are such and so, and you set forth these issues of fact. Now, if you have agreed between yourselves that these are issues of fact to be tried, how can you come in now and say that it is immaterial, or how can you come in and say, "We have never had an opportunity to have that presented to the court"?

Now, if, as an illustration, he contended that it

(Testimony of Alleen S. Mildren.)

was an issue of fact in this case and you contended it was not an issue of fact in this case, then, of course, the issue would be whether or not it was an issue of fact in this case, that would be the thing that would be left for me to rule on.

But, when you say it is an issue of fact and state, agree in here that it is an issue of fact in the case, and now you object to it because of its immateriality——

Mr. McWilliams: Well, then, I didn't understand that that was the effect of the pretrial order. I understood that they were the contentions that were made but it was left for [12] the trial court to rule on whether or not those contentions were material.

The Court: Now, I don't understand, counsel, how you could say that. The memorandum which you filed, it is true, includes your contentions. You each filed your memorandum. The other party had nothing to do with that, no other counsel except you, because those are your own contentions. In that memorandum you set forth what your contentions are and he sets forth what his contentions are, with respect to the issues that are to be tried. But this pretrial order, of course, sets forth those matters that you agree upon, because you both signed it. It is signed by both before it is ever submitted to me.

Mr. McWilliams: I remember, but you sent us back two or three times to try to agree and I thought that was the effect——

The Court: Counsel, I can't remember that par-

(Testimony of Alleen S. Mildren.)

ticularly, but if I sent it back to you two or three times, then I know you have no excuse, because it is true there are times when counsel have difficulty understanding these things and I make it very clear to them. Sometimes, for instance, counsel on one side will come in and contend that a certain matter is in issue and counsel on the other side thinks that it is not an issue in the case and, of course, I repeat, and I am sure if that question was before me I repeated it, that you, of course, [13] would not put anything down as an issue if you do not agree that it is an issue. But, if counsel on the other side contends that it is an issue and you contend it is not an issue, that is the issue, that is, whether or not it is in issue is an issue. It might sound confusing, but, it should be very clear to an attorney.

If one person says the fact that the sun was shining that day, if it was a fact, is an issue in this case and if you contend that that is not an issue in the case, that it is immaterial whether the sun was shining or not, then you say it is immaterial and he says it is material, he says it is an issue, and so, of course, the issue is what I must decide, so I must decide whether or not it was material that the sun was shining that day. Of course, there is no great difficulty about that, because if you are satisfied that it is material or was not material, and he is satisfied that it is, all you need to put down as an issue is, is it a material issue in this case whether the sun was shining on such and such a date? That is one of the things that I must decide.

(Testimony of Alleen S. Mildren.)

Mr. McWilliams: Yes.

The Court: Then you would put down as an issue in this case whether or not the sun was shining. That is all there is to it. That is the issue, and you agree upon it.

Mr. McWilliams: In this particular case I believe that is covered under the "Issues of Law" that are set forth here. [14] I think they take care of the question as to whether or not these matters are material or whether they have already been decided.

The Court: All right. Then, if the issues of law take care of it, all right, but I am trying this case on the pretrial order. This case is tried on the pretrial order. So, of course, I must try this case by taking the issues which you have set out. The attorneys are familiar with the case, they are familiar with the facts and familiar with the issues.

The purpose of the pretrial order is so you can acquaint the judge with those, so when you try the case and you are presenting an objection to the materiality of something, if I don't know where it fits into the picture, I look to the pretrial order and when I look to the pretrial order I have what you agree are the issues involved, and you have agreed that that is an issue here.

When this case is over it may be that I will decide that you folks were in error when you stated that it was an issue whether the sun was shining on a particular day, or whatever it may be, and I may decide that you folks are wrong because it is imma-

(Testimony of Alleen S. Mildren.)

terial and not consider it in the decision of this case, but when I am trying the case I can't say to counsel, "The thing that you both agree as an issue here is not an issue," because you know all about the case and I don't. You [15] have talked to all these witnesses. I am going to learn it from the stand here as the evidence develops.

Mr. McWilliams: Well, I am not sure. I misunderstood what we were supposed to do, and I am afraid it is going to waste a lot of time.

The Court: Well, to me, that is no excuse, if the work was properly done. That is the reason why we have a pretrial order, so that counsel can agree upon those things that it is possible for them to agree upon, and I assumed that is what you folks had done here.

Well, you may proceed. Objection overruled. You may answer the question.

Read the question.

(Pending question read by the reporter.)

Mr. Peterson: May I withdraw the question and restate it? There are two inaccuracies in it and I would like to correct them.

The Court: All right.

Q. (By Mr. Peterson): Will you state whether or not the insurance policies which are the subject of this action——

The Court: If you are going to restate the question, then you can put it so as to eliminate any lead-

(Testimony of Alleen S. Mildren.)

ing question as to where the policies were, if she knew, at that time.

Q. (By Mr. Peterson): Do you know where the policies, which are the subject of this action, were at the time that [16] that document was executed?

A. Only that he said that his mother had them and that he would bring them to me as soon as he came out again.

Q. And did he, in fact, bring them to you?

A. Yes, sir, he did.

Q. When was it with reference to the time that the document, which has been marked as Exhibit No. A, was signed? A. Within two weeks.

Q. Let us go back a little bit. Had Dr. Mildren been living at home, at 346 North Mango Street, with you for some time prior to this agreement of January 28, 1948? A. No. Just on week ends.

Q. Where had he been living for the year or two previous to that? A. In Los Angeles.

Q. And with whom? A. His mother.

Q. When he came out and brought you these policies, in what form did he bring them to you, were they in packages, that is what I am getting at?

A. They were in a big, heavy paper shopping bag.

Q. Who was present in your home at the time that he brought them to you?

A. My son, Donnie.

Q. What did you then do with the policies? [17]

A. Well, it was on a Friday night, oh, around 8:00 o'clock, and I wasn't worried about them and

(Testimony of Alleen S. Mildren.)

they just stayed in the living room until Monday morning.

Q. Then, on Monday morning, what did you do with them?

A. We, he and I took them over to a neighbor's to keep.

Q. What was the name of the neighbor?

A. Mrs. Maycock.

Q. And where does she live with reference to where you were living at that time?

A. Oh, a couple of miles.

Q. Was it still within the Fontana area?

A. Oh, yes, sir.

Q. Did your husband go over with you to Mrs. Maycock's house at the time you took the policies over there? A. He drove the car over, yes, sir.

Q. What was your purpose in leaving them with Mrs. Maycock at that time?

A. He had a ticket for me to go to San Francisco to see my oldest boy, and I wouldn't have had the time to take them into the bank at San Bernardino and put the policies away, and he made that reservation that he had made for me in Los Angeles, out of Los Angeles.

Q. Did you, in fact, go to San Francisco on [18] that occasion? A. Yes, I did.

Q. How long were you gone?

A. Five or six days. I don't just remember.

Q. Then, when you came back, what did you do with reference to the policies?

(Testimony of Alleen S. Mildren.)

A. I went over and got them and put them in the vault at San Bernardino.

Q. At the time that your husband brought these policies to you following the execution of this agreement, did he say anything about them?

A. Well, it was always understood——

Mr. Peterson: No. That isn't my question.

A. Yes, sir, he said, "This is your Social Security." That is the way he spoke of it, as my Social Security and the best.

Q. And what did he physically do with the bag in which these policies were contained at that time?

A. Well, he brought them into the house. He had some other things in the bag, and a great big heart-box of candy. He took the candy out and he just left the policies right in the bag, right in the living room.

Q. And they remained there in the same place until you took them over to Mrs. Maycock's, is that right? A. Yes, sir. [19]

Q. What was the source of the funds that were used to pay the premiums upon those policies?

A. Money that I had worked in the office for.

Q. Well, was your husband working at the same time?

A. We both worked in his office, yes, sir.

Q. What was his occupation?

A. Physician and surgeon.

Q. Was he a medical doctor or what?

A. An osteopathic physician and surgeon.

Q. Where did he have his offices at the time these policies were executed?

(Testimony of Alleen S. Mildren.)

A. First at 5401-10th Avenue, that is a corner property, and later he built at 3210 West 54th, which is adjoining the residence.

Q. When was it that you moved to Fontana?

A. On February 13, 1942.

Q. And you have lived there ever since?

A. Yes, sir.

Q. Does your son, Donald Mildren, live there with you at the present time? A. He does.

Q. Now, going back to the time that the agreement, cross-defendants' Exhibit No. A, was executed, was there anything said between your husband and yourself at that time in regard to these policies? [20] A. Yes. He said that——

Q. All right, let us find out who was present there at the time, if anyone else.

A. Well, Donnie was in the living room when he brought them in that night.

Q. No, but I am going back to the time the agreement itself was executed.

A. Oh, yes, over at the attorney's office.

Q. And what attorney was that?

A. Attorney Reid in Riverside.

Q. Is that Mr. Enos Reid? A. Yes, sir.

Q. And what was said at that time regarding the policies?

Mr. McWilliams: To which I object on the ground it is hearsay as to my client, Jessie Mildren.

The Court: Objection sustained.

Q. (By Mr. Peterson): Since the date upon

(Testimony of Alleen S. Mildren.)

which you took the policies back from Mrs. Maycock, in whose possession have they been?

A. Mine.

Mr. Peterson: I have no further questions at this time. [21]

Cross-Examination

By Mr. McWilliams:

Q. Mrs. Mildren, you mentioned another policy that I understood was in the Mutual Life Insurance Company of New York, in addition to the five that are mentioned in this action? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Do you have that policy here with you?

A. No, sir.

Q. You say that you were the first beneficiary on that policy, or was Paul the first beneficiary?

A. That is in the vault?

Q. Well, the other policy that is not mentioned in this action?

A. I couldn't tell you to remember correctly, Mr. McWilliams.

Q. In other words, you don't recall whether you were the first beneficiary and then Paul was the second beneficiary or Donald was the first beneficiary?

A. Not to be correct, I couldn't say.

Q. Have you collected on that policy?

A. No, sir.

Q. Do you still have that policy in your possession? [22] A. Yes, sir.

(Testimony of Alleen S. Mildren.)

Q. Do you know the number of the policy?

A. No, sir.

The Court: Excuse me. I am not sure that I understand that. Do I understand that was the policy on the life of your former husband?

The Witness: Your Honor, I——

The Court: Just answer my question.

The Witness: Yes, sir—no, sir. If Paul, Jr., goes, it comes to me.

The Court: Can you just answer my question? Was it on the life of your former husband?

The Witness: No; no, sir.

The Court: All right, you may proceed.

Counsel, I asked you when you went into this question whether that is what you were interrogating her on.

Mr. Peterson: That was my understanding.

The Court: But you are talking about the policy on someone else that has no connection to the decedent at all. You should have told me that.

Mr. Peterson: My understanding was otherwise. I learned it just in the last few days and didn't have a chance to put it in our pretrial memorandum. I may be able to clear it up, however.

The Court: If it is a policy on the life of her son, [23] then, of course, it is immaterial. That is why I asked the question. He made an objection to it on the ground it is immaterial and obviously it is immaterial, if you are talking about a policy on the life of her son.

(Testimony of Alleen S. Mildren.)

Mr. Rogers: I move that all testimony in reference to that policy be stricken.

The Court: Granted. It may go out.

Q. (By Mr. McWilliams): Mrs. Mildren, do you have the five life insurance policies that are the subject of this action here today? A. Yes, sir.

Q. May I see them, please?

May I approach the witness?

The Court: Yes.

(The witness produces documents.)

Mr. McWilliams: At this time, your Honor, I would like to offer into evidence the five life insurance policies which are the subject of this action and which are described in the pleadings and in the pretrial memorandum.

The Court: Very well. They will be admitted in evidence as one exhibit.

Mr. McWilliams: As one exhibit, your Honor, yes.

Mr. Rogers: For the purpose of the record, could they be identified by policy numbers, or is that necessary?

The Court: Well, if they are all one exhibit, it isn't [24] necessary, although if you wish you can identify them.

Mr. Rogers: By the policy numbers.

The Court: You may read them off, if you care to, just take the policies and read from them, and identify them if you wish.

Mr. Rogers: Counsel has already checked them as against his notes. Is that correct?

(Testimony of Alleen S. Mildren.)

Mr. McWilliams: That is correct. There are five policies in the Mutual Life Insurance Company of New York, on the life of Paul Mildren, Sr., which are described upon page 2, lines 25, 26 and 27, of the pretrial order.

The Court: Very well. They will be received.

The Clerk: Cross-complaint's Exhibit No. 1.

(The documents referred to as Cross-Complainant's Exhibit No. 1 were received in evidence.)

The Court: As Cross-Complainant Jessie Mildren's Exhibit No. 1.

Mr. McWilliams: That is all, your Honor.

The Court: Any questions, Mr. Rogers?

Mr. Rogers: No questions.

The Court: You may step down.

(Witness excused.) [25]

MELBOURNE S. HAMILTON

called as a witness herein on behalf of the cross-defendants Alleen S. Mildren and Donald L. Mildren, being first duly sworn, testified as follows:

The Clerk: Your full name, please.

The Witness: Melbourne S. Hamilton.

Direct Examination

By Mr. Peterson:

Q. Mr. Hamilton, you are a deputy county clerk of the County of San Bernardino, are you?

A. I am.

(Testimony of Melbourne S. Hamilton.)

Q. And as such, you have access to all the records and files of the Superior Court there?

A. I do.

Q. Have you brought with you, pursuant to subpoena, the original file in action No. D 68261 of the Superior Court of San Bernardino County?

A. I have.

Q. Is that the action involving Alleen S. Mildren, as plaintiff, and cross-defendant, versus Paul Mildren, defendant and cross-complainant?

A. That is correct.

Mr. Peterson: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Peterson): I call your attention, sir, to [26] a document filed September 28, 1950, entitled "Cross-Complaint," by Paul Mildren. This is part of the file in the divorce action referred to?

A. Yes, file No. 68261, Official Records, San Bernardino County Superior Court.

Q. I call your attention to the allegations contained in Paragraph V c, "That the parties hereto own and possess the following community property:

"c—Life insurance policies" that is contained in the file, as well, is it not? A. That is correct.

Mr. McWilliams: Your Honor, to that question I would like to make an objection on the ground that it is not material, it is not an issue in this case, and I don't believe that there is any issue of fact agreed upon in the pretrial order as to what plead-

(Testimony of Melbourne S. Hamilton.)

ing or what preceded the orders set forth in the pretrial order.

The Court: Well, counsel, I understood that it was your position that these policies were granted to the decedent——

Mr. McWilliams: That is correct.

The Court: By the court, in this divorce action?

Mr. McWilliams: That is correct, your Honor.

The Court: Isn't this the divorce action that he is referring to here, these documents?

Mr. McWilliams: Yes, your Honor, that was the divorce [27] action, but there is the final decree there, and all the proceedings prior to and leading up to that decree would be merged in the decree. And the only thing that would be material would be the decree itself and not the pleadings or the evidence that led up to that decree.

The Court: But as I understand your position, you disagree as to the interpretation of that decree as to what was granted in the decree, do you not?

Mr. McWilliams: No, your Honor, I don't think there is any disagreement about the wording of the decree.

The Court: But, isn't it a fact that you contend these insurance policies passed under the decree and he contends they did not pass under the decree?

Mr. McWilliams: That is right.

Mr. Peterson: That is correct, your Honor.

Mr. McWilliams: That is right.

The Court: And I am supposed to decide that?

Mr. McWilliams: Yes.

(Testimony of Melbourne S. Hamilton.)

The Court: So you say it is immaterial and that I shouldn't know anything about what happened in this lawsuit?

Mr. McWilliams: Yes, your Honor, I think——

The Court: Is that your position?

Mr. McWilliams: I think that your decision has to be on the basis of the decree itself, rather than the pleadings that led up to the decree. [28]

The Court: I have to know what happened in that lawsuit. In other words, if it is your contention and you say that the decree means one thing and he says that it means another, and you say it included and passed those policies and he says it didn't pass the policies, obviously, before I even see it, it must be ambiguous; it must be or you would not be disagreeing. So, of course, it is going to be necessary for me to know what occurred in that lawsuit.

Mr. Rogers: If the court please, I think that Mr. McWilliams' position was that if this file is to be put into evidence piecemeal, through the testimony of a witness, that we are getting the cart before the horse. It seems to me that for the purpose of saving time, if that judgment and that entire record goes into evidence, all right, but the testimony of this witness should not take it apart piece by piece.

The Court: Well, counsel, that is not the position that Mr. McWilliams took, because, as a matter of fact, that is why I asked those questions. It is amazing to me. Frankly, I would have thought that he

(Testimony of Melbourne S. Hamilton.)

would be wanting to get the whole file into the record, instead of keeping it out. That is why I thought I must have misunderstood you here. It would seem to me that he would want that in the record, the whole file, because, of course, he necessarily must be looking to this court to declare that those policies [29] were a subject of that action and passed under that decree, if I understand his position properly, so it would seem to me he would want that in the record.

Mr. McWilliams: I have no objection to the file being in the record, but it is my position that the decrees in that action are not ambiguous, they are perfectly plain on their face, and that it is not necessary, and it is only wasting time to go into what led up to them. And in making my objection I was trying to get a ruling on that point.

The Court: Well, do you wish to offer this record into evidence?

Mr. Peterson: Yes, your Honor. My only purpose in asking him these questions is to try to confine it down to the matters which are directly in issue, but I have no objection to the entire file going in if the court feels it would be helpful.

The Court: All right, put the whole file in evidence, and the particular portions of it that you think are appropriate to your position, you simply refer to them in your argument.

Mr. Peterson: Very well, your Honor. The file is offered in evidence as the cross-defendants Mildrens' Exhibit next in order.

(Testimony of Melbourne S. Hamilton.)

(Said file was designated as Cross-Defendant Alleen S. Mildren Exhibit B.)

The Witness: If your Honor please, these are official records of San Bernardino County and the only records, and [30] perhaps counsel might stipulate that certified copies may be substituted therefor, so that we might return those files. Those are the only files we have.

Mr. Peterson: I would have no objection to that. I think it could be photostated by the clerk.

Mr. Rogers: I have no objection to it being withdrawn bodily and returned to the clerk, with the permission of the court, after the final determination of this action, to save the expense of replacing it.

Mr. McWilliams: Your Honor, I have already certified copies of all the papers respecting this file which I feel material and I will be glad to introduce those and agree that the file may be returned.

The Court: Well, there is one thing that could be done: At 11:00 o'clock, when the court takes a recess, you can take a look at the file, and if you ascertain they are certified copies of all the documents needed, then, of course, you may stipulate that photostatic copies may be used and the file can be returned to the clerk. That will take care of it.

Mr. Peterson: There are some that aren't certified.

The Court: If you feel there are some that he doesn't have copies of, which you feel you should

(Testimony of Melbourne S. Hamilton.)

have, then you may substitute copies for those, have copies made, but first of all you should find out and determine that at 11:00 o'clock.

Mr. Peterson: I have no further questions. [31]

Mr. McWilliams: No questions.

Mr. Rogers: No questions.

The Court: Can you wait for a few minutes?

The Witness: Oh, yes.

DONALD LEE MILDREN

called as a witness herein on behalf of the cross-defendants, Alleen S. Mildren and Donald Lee Mildren, being first duly sworn, testified as follows:

The Clerk: Your full name, please?

The Witness: Donald Lee Mildren.

Direct Examination

By Mr. Peterson:

Q. You are Donald Lee Mildren and you are the son of both Alleen S. Mildren and Paul Mildren, are you not? A. Yes.

Q. And were you living in the home of your mother at 346 North Mango Street, during the months of January and February of 1948?

A. Yes.

Q. At that time where was your father living?

A. In Los Angeles with his mother.

Q. Now, do you recall being present when the agreement which has been introduced into evidence was discussed between your father and mother? [32]

(Testimony of Donald Lee Mildren.)

A. Yes.

Q. You may answer that yes or no.

A. Yes.

Q. Now, do you know when the document itself was executed?

A. Yes, in the latter part of January.

Q. Of 1948? A. Right.

Q. Now, then, at that time or approximately at that time, did you see the insurance policies which are involved in this action? A. Yes.

Q. Will you tell the court under what circumstances you saw them, who brought them where and what became of them, that you saw yourself?

A. It was some time in February. My father brought them out in a shopping bag. He usually came out Friday or Friday evening or early Saturday morning. He brought them out and there were some other things in there, and a box of candy. That is all I can remember about it.

Q. And did he say anything about them, when he brought them? A. Yes, he did.

Mr. McWilliams: I object to any conversation because it is hearsay as to my client. [33]

Mr. Rogers: The same objection.

The Court: You may answer that question yes or no. Did he say anything when he brought them?

The Witness: Yes.

Q. (By Mr. Peterson): Who else was present at that time? A. My mother.

Q. And yourself and father? A. Yes.

Q. What was said?

(Testimony of Donald Lee Mildren.)

Mr. McWilliams: And to which I object on the ground that it is hearsay insofar as my client is concerned.

The Court: The objection is sustained.

Q. (By Mr. Peterson): Now, what became of the policies, if you know?

A. My mother and father took them up to Mrs. Maycock's house.

Q. When was that with reference to the time that the policies were brought by your father to your mother? A. It was on a Monday morning.

Q. And did you see the policies again after that time? A. Yes.

Q. And where did you see them?

A. My mother has had them.

Q. How long was it after the time that they had been [34] taken over to Mrs. Maycock's house?

A. I can't really be sure as to the exact date, sir.

Q. Well, approximately when?

A. Within six months to a year, and then I have seen them after that, of course.

Q. In whose possession had they been during all times that you have seen them?

A. My mother's.

Mr. Peterson: You may cross-examine.

Mr. McWilliams: No questions.

Mr. Peterson: Do you have any questions, Mr. Rogers?

Mr. Rogers: Yes.

(Testimony of Donald Lee Mildren.)

Cross-Examination

By Mr. Rogers:

Q. You went along with your mother and father when these policies were taken to the neighbor's house, did you? A. No, I didn't.

Q. You don't know, of your own knowledge, that they were taken over there, do you?

A. Well, all I can say is I saw them get in the car with them, and that is where they told me they were going with them. I couldn't——

Mr. Rogers: No other questions.

Mr. McWilliams: No questions.

Mr. Peterson: You may stand down.

(Witness excused.) [35]

Mr. Peterson: Mrs. Maycock.

EDITH V. MAYCOCK

called as a witness herein on behalf of the cross-defendants, Alleen S. Mildren and Donald Lee Mildren, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Edith V. Maycock.

Direct Examination

By Mr. Peterson:

Q. Where do you live, Mrs. Maycock?

A. I live at 1783 Laurel Drive, in Fontana.

Q. Is that the same address where you have

(Testimony of Edith V. Maycock.)

lived for many years past? A. Yes.

Q. Are you acquainted with Alleen S. Mildren, one of the parties to this action? A. I am.

Q. And in his life were you acquainted with Paul Mildren, Sr.? A. Yes.

Q. I call your attention to a time in the early part of February, 1948, and ask you to state whether or not at that time Mrs. Mildren came to your home and brought you some documents?

A. They did, both the doctor and Mrs. [36] Mildren.

Q. Now, at the time that they arrived at your home, do you remember the time of the day it was?

A. Well, it seems to me it was early in the morning, but I could not say positively about that.

Q. I want you to tell in detail what was said by both Mrs. Mildren and by Dr. Mildren at that time?

A. Well, I was in my front bedroom and it looks right out on the street, and I saw Dr. Mildren and Mrs. Mildren driving up, and she was in a hurry and I just motioned for her to come in, that is what it seemed to tell her, and she just got out the car and came and said, "Here, I have some"——

Mr. McWilliams: To which I object.

The Court: Sustained. Don't give us conversation, don't tell us what was said. Just tell us what happened.

Mr. Peterson: Yes.

The Witness: Mrs. Mildren brought some papers in, in a shopping bag, and she said, "Will you take care of these for me?"

(Testimony of Edith V. Maycock.)

Mr. Peterson: No. You are getting into conversation again.

The Witness: I am sorry.

Mr. Peterson: Which we are not allowed to have. It would be hearsay, Mrs. Maycock.

Q. (By Mr. Peterson): What were the documents which she brought to you? [37]

A. Well, she said they were——

Mr. McWilliams: To which I object.

Mr. Peterson: No.

Q. (By Mr. Peterson): Did you look at them and see what they were?

A. I took the bag and put it in a box and I didn't look at it, at that time.

Q. Did you later look in it, before you gave it back to Mrs. Mildren?

A. She came back and she showed them to me, when she came back to get them.

Q. And what documents were they?

A. They were annuities and insurance policies, and fire insurance policies I think.

Q. I show you these five policies which have been marked as Cross-complainant Jessie Mildren's Exhibit No. 1 and ask you to look at them.

(The witness examines said documents.)

Q. (By Mr. Peterson): I will ask you whether or not those appear to you to be the same policies that you received at that time? A. They do.

Q. Then, what became of the policies, that is,

(Testimony of Edith V. Maycock.)

how long did they remain in your possession and to whom did you deliver them? [38]

A. They must have been—they were there a few days, I don't remember, three of four days; Mrs. Mildren came and got them.

Q. Was Dr. Mildren with her on that occasion?

A. No.

Q. Did you ever see the policies again, then, after that time? A. No.

Q. That is, until now?

A. Until now, just now.

Mr. Peterson: You may cross-examine.

Cross-Examination

By Mr. McWilliams:

Q. Mrs. Maycock, you say that these are the same policies as were in the shopping bag in 1948?

A. They appear to be, to me.

Q. Well, isn't it as a matter of fact, you just saw policies at that time and you see policies now? Is there anything about these policies that makes you sure that they are the same policies you saw then?

A. By inspecting them today I think they are the same. I remember them being white policies, and I think they are the same, I feel sure, because——

Q. In other words, you feel they are the same because they are white policies? [39]

A. No, because she showed them to me and I read what they were.

(Testimony of Edith V. Maycock.)

Q. How many policies were in the shopping bag?

A. Well, there were more than that five, there were more.

Q. You don't remember how many there were?

A. No, I didn't count them.

Q. You don't remember the numbers of the policies, do you? A. No, sir.

Mr. McWilliams: That is all.

Mr. Peterson: That is all.

(Witness excused.)

Mr. Peterson: I have one more witness, your Honor, whom I would like, if I could, to examine out of order, that is in regard to one of the issues, that appears in the pretrial order, as to whether or not the service of an order was effected. This particular gentlemen is employed at nights and sleeps in the daytime and if counsel is not inconvenienced by it I would like to put him on. His testimony will be very brief.

Mr. McWilliams: I have no objection.

Mr. Peterson: Mr. Bell. [40]

WILLIAM AUGUSTUS BELL

called as a witness by and on behalf of the cross-defendants Alleen S. Mildren and Donald Lee Mildren, being first duly sworn, testified as follows:

The Clerk: Your full name, please?

The Witness: William Augustus Bell.

Direct Examination

By Mr. Peterson:

Q. Mr. Bell, what is your business or occupation?

A. I am a private investigator and also run the Merchant's Patrol.

Q. Are you employed by anyone?

A. Krekel Investigation Bureau.

Q. Where is that located?

A. In San Bernardino.

Q. Are you acquainted with Mrs. Alleen Mildren, one of the parties to this action?

A. Yes.

Q. Do you know where she lives on Mango Street in Fontana? A. Yes, sir.

Q. Calling your attention to the early part of 1954, did you have any particular duties with respect to her home? A. Yes, sir.

Q. And what were your duties at that [41] time?

A. We were checking it. She was out of town at the time.

(Testimony of William Augustus Bell.)

Q. You were checking what, sir?

A. The premises or house. We were on the patrol and we just go out and we check the windows and the doors and see if anyone was trespassing or any malicious mischief or anything going on, on the property.

Q. Now, on the occasion of your visits to this property in the early part of the year 1954, did you find any document stuck up anywhere on the house?

Mr. McWilliams: Your Honor, I would like the record to show that this testimony I believe is immaterial. I am not objecting to the statement of the court that anything that is in the pretrial order is admissible and material as far as testimony is concerned, but I don't want it to be understood that I am waiving objection to the materiality.

The Court: Now, counsel, if you have an objection, you make it. Now, you say because of my statements that it is in the pretrial order, that makes it material. I don't know. I do say that anything you say is material, and the last thing you referred to, you stated that it was material. I don't know whether this is or not, and I don't even know whether you have stated in your pretrial order that it was material. Frankly, the evidence hasn't gone far enough for me to know just what the purpose of it is. I don't know. I am looking [42] at the pretrial order here and I see where you state that it is an issue of fact as to whether a certain return was made in the Sheriff's Office. I don't know if that is what you are referring to. However, I don't

(Testimony of William Augustus Bell.)

think this is the same man, because the name he has given here today is not the name of the sheriff who made that return.

Mr. McWilliams: No. That is another matter.

The Court: Oh, that hasn't anything to do with this?

Mr. McWilliams: No, it has not.

The Court: If you think it is immaterial——

Mr. McWilliams: I will make my objection at the proper time.

The Court: All right.

Q. (By Mr. Peterson): Did you find some legal document stuck up on the outside of the house?

A. Yes, sir.

Q. Where did you see it?

A. It was stuck under the window to the left of the front door.

Q. And how often did you see that document there? A. I saw it the day I removed it.

Q. You say you removed it. Did you remove it to see what it was? A. Yes, sir.

Q. What was it? [43]

A. It was——

Mr. McWilliams: To which I object on the ground it is immaterial and not within the issues in this case.

The Court: Objection sustained.

Mr. Peterson: I wonder if I may be heard, your Honor?

The Court: Yes, you may.

(Testimony of William Augustus Bell.)

Mr. Peterson: And state the purpose of it. You will note in the pretrial order a copy of that return that the sheriff made and following that, the question is, was the service effected? That is also contained in the pretrial order and we propose to show the court what was in fact done with regard to the service of it.

The Court: It is too remote, counsel.

Assuming that it was material here, that would not prove that it was or wasn't. In other words, this man didn't have anything to do with the service. It could be that it was served, a document might have been served on someone and subsequently stuck under the door. That doesn't prove anything.

Mr. Peterson: What my offer of proof would do, your Honor, is to show that this document was taken off by this witness and returned to Mr. McWilliams and it related to the same document.

The Court: Is this witness a deputy sheriff of San Bernardino County? [44]

Mr. Peterson: No. He was guarding the property at the time Mrs. Mildren was there, and found the document there. It had been there several days.

The Court: Well, the objection is sustained.

Mr. Peterson: I have no further questions.

Mr. McWilliams: No questions.

The Court: May Mr. Bell be excused?

Mr. Peterson: I have no further evidence.

The Court: Well, we will take the morning recess and you can take those documents up with Mr.

Peterson there and see if you can agree so that the clerk can take his file.

Mr. McWilliams: Your Honor, Mr. Peterson has already examined these documents this morning and I would like to introduce them into evidence, that is all I have, just to introduce these documents and I will be through.

Mr. Peterson: I have no objection to those documents going into evidence. My only objection is that I think there are other documents which I think the court should have in order to understand the case. I have seen documents that he has and I have no objection to those going in.

The Court: All right. Then, will you point out what other documents are in there and then you may have photostatic copies made of them.

Mr. Peterson: Yes.

The Court: If you wish, so that the court clerk can get [45] his file. Now, will you check that with him?

Mr. Peterson: Yes, sir.

The Court: So that you can determine if there are documents in the file that he does not have. Then, let me know when I take the bench again, and arrange for you to take the file and have photostats made and substitute the photostats for the originals, so that the file may be returned to the clerk. Now, of course, afer you have discussed it together and looked at those files, then you will be in a better position to know what is necessary.

We will take a 10-minute recess.

(Recess.)

Mr. Peterson: If the court please, we have examined the file. Of course, the entire file is in evidence and the only parts of it I think that the court may need to consider would be the pleadings of the action, and if it meets with the court's approval, I suggest that the file be returned to Mr. Hamilton, who has told me that he will take them and photostat them, which he will certify himself today and have them in the court's possession. They are the complaint, answer, cross-complaint and the answer to cross-complaint, in addition to the documents which Mr. McWilliams has which are certified copies, and I have no objection to those going in.

Mr. McWilliams: Your Honor, I would like to introduce the informal Opinion of the Court, which was filed February 11, [46] 1953. I mean I would like to introduce a certified copy of it. I don't have a certified copy here.

The Court: First of all, what are the documents that you have here? Now, these are the documents that you have examined and they are certified copies——

Mr. McWilliams: Yes, your Honor.

The Court: ——of portions of the record of that case in the Superior Court in San Bernardino County.

Mr. McWilliams: That is correct, your Honor.

The Court: All right. Now, do you want to offer those?

Mr. McWilliams: Yes. However, they are all documents that are contained in the Superior Court

file and as I understand it, the Superior Court file is already in evidence, so we are simply offering these photostatic copies to substitute for the file itself, for the originals.

The Court: Well, that is right. The only thing is that you will have to put them in under numbers, because they are not complete copies of the record. In other words, you have the Superior Court file in, and as I understand your prior stipulations, you will not have the complete Superior Court file in after those photostats are made, that you have agreed that the file may be removed, on condition that certified copies of portions of the file are put into the record, and so that we might identify them without any mistake, we [47] can have them marked. I am trying to take one step at a time.

As I understand, you have in your hands now certified copies of portions of the file, and that there is another document which you do not have, of which you are going to obtain a copy, and there are some documents which you do not have copies of that Mr. Peterson wants in and that he is going to get. So let us take one at a time. Let us put in what you do have.

Mr. McWilliams: I have a cerified copy of interlocutory judgment of divorce in this action No. 68261, which was filed April 8, 1953. Do you want to give one number to all of them at this time, your Honor, or number them separately?

The Court: Well, you can put them all in under one number.

Mr. McWilliams: There is a certified copy of the

final judgment of divorce in this same action, which was filed April 12, 1954.

There is a certified copy of order to show cause and affidavit in re contempt, in this same action, which was filed January 18, 1954.

There is an informal opinion in this same action, a certified copy of an informal opinion in the same action which is dated March 19, 1954.

There is a certified copy of findings of fact and conclusions of law in this same action, which were filed May 7, [48] 1954, and are dated May 7, 1954.

And a certified copy of an order made on trial of orders to show cause, which was filed May 7, 1954.

There is a certified copy of a return of service by the Sheriff of San Bernardino County, which was filed May 11, 1955. I am sorry.

Mr. Peterson: It is endorsed May 11, 1955, and dated June 21, 1954.

Mr. McWilliams: Yes, it is dated June 21, 1954, and filed May 11, 1955.

There is a certified copy of affidavit of service of order made on trial of orders to show cause, which was filed April 20, 1955.

Mr. Peterson: As to that one, your Honor, I have this objection, that it is irrelevant in that service was made at a time after the death of Paul Mildren, Sr., at a time when Mr. McWilliams did not represent the personal representative of his estate, and that, at that time Mr. McWilliams was acting for a client who is no longer here.

Mr. McWilliams: Mr. Peterson, I think, is arguing a question of law, because he has already introduced this document into evidence and I am simply substituting a copy.

Mr. Peterson: It is a part of the file, but we make objection to its consideration by the court on the ground it is irrelevant. [49]

The Court: He may put it in as a copy of the document which is already in evidence, or a portion of it. Now, as to the effect of it, of course, there are many papers in that file on which you perhaps differ. As to their effect in this particular proceeding, that you may argue.

Mr. McWilliams: Your Honor, that completes the list of certified documents from this file. I have some other documents to introduce. I think we ought to assign one number for the documents I have just listed.

The Court: Well, give those that you have there to the clerk and they will be given a number.

The Clerk: Cross-complainant Jessie Mildren's Exhibit No. 2.

(The documents referred marked as Cross-Complainant's Exhibit No. 2 were received in evidence.)

Mr. McWilliams: Now, I have some other documents.

The Court: Well, give him all those documents you have, now. They are all copies of certain documents that are in the file.

Now, in addition to that, I understand as to one

other document in the file you don't have a copy of and you wish to have a certified copy made.

Mr. McWilliams: Yes, your Honor. That is an informal opinion which was filed February 11, 1953. I say, "informal." It is a signed memorandum opinion. It is not the final decree [50] but it is an opinion by the judge pro tem who tried that case.

Mr. Rogers: The document is dated February 10, 1953, and filed February 11, 1953.

Mr. McWilliams: I will file a certified copy of that document.

The Court: Very well. That certified copy of the document will be received and marked as part of this exhibit you have just put in.

Mr. McWilliams: All right, your Honor.

Now, there is an exhibit, which is referred to in this opinion, that is missing from the file of exhibits, and I want that exhibit in evidence, but if it can't be found I, at least, want a record made of the fact that I offered it in evidence, and that is Exhibit "E" which is referred to in the first paragraph of the opinion.

Mr. Rogers: If the court please, it would be my thought that the deputy clerk be recalled to the stand with reference to that exhibit. The exhibits are here and we have not been able to find the particular exhibit that is referred to in the opinion, and I think this clerk may be able to lay some foundation for its absence.

The Court: Well, you can call him, if you wish. I can't sit here and guess, you know, as to these documents. Of course, what should have been done, if

you had been prepared with this case, you would have come in here with certified [51] copies of the papers that you want, instead of handling it in this slipshod manner, each of you would have had the certified copies of the papers that you wanted to put into evidence.

Now, you are referring to a paper that is not included in the file, is that it?

Mr. McWilliams: That is right, your Honor.

The Court: You may proceed to try and prove it, if you can, whatever you want to do. Go ahead.

Mr. McWilliams: I have three other documents here which I would like to introduce at this time. One of them is a photostatic copy of the original request for change of beneficiary which is referred to in this file and in the pretrial order. I have had the original in court and counsel has had a chance to inspect it, and we agreed that I could introduce a photostatic copy instead of the original.

Mr. Peterson: I am not objecting to the foundation on it.

The Court: What is that?

Mr. Peterson: I am not objecting to the foundation.

The Court: All right. It will be received.

The Clerk: Cross-Complainant Jessie Mildren's Exhibit No. 3.

(Said request for beneficiary was marked as Cross-Complainant's Exhibit No. 3 and received into evidence.) [52]

Mr. McWilliams: Another is an original letter

written by Mr. Taylor F. Peterson, dated April 19, 1954, as referred to in the pretrial order.

Mr. Peterson: I am going to object to that on the ground it is set forth at length in the pretrial order and stipulated to, and there is no need of encumbering the record with it.

Mr. McWilliams: All right.

The Court: Is that correct?

Mr. McWilliams: That is correct, your Honor. I will withdraw that.

Another document, which I will admit is immaterial, but I think it should be called to the court's attention on the question of fact, that there is a statement of fact in the pretrial order that the order made on trial of orders to show cause has never been served on Alleen Mildren. I have an affidavit of service here showing that it was served May 10, 1955.

Mr. Peterson: I am going to object to that as immaterial. She is here in any event. She was also served with the subpoena, on the same day, by Mr. McWilliams, to bring the policies into court, which she did.

I see no point which would assist the court in any way, to learn that she had also been served with this Superior Court order on May 10, 1955. I object to it as immaterial, incompetent and irrelevant. [53]

The Court: Objection sustained. As I understand, you are now talking about a service of that order to show cause in that proceeding in San Bernardino back in 1954?

Mr. McWilliams: That is correct, your Honor.

The Court: You stipulated that it hadn't been. In other words, at the time of the filing of this action, it had not been served upon her at all. You have a stipulation to that effect in the pretrial order.

Mr. McWilliams: That is correct, at that time, yes.

The Court: That is the order you are now referring to, isn't it?

Mr. McWilliams: That is correct, at that time. Now, it has been served since.

The Court: What will it prove, that it has been served now?

Mr. McWilliams: I first want to make it clear that this statement number 9 is not now true, even though it was true at the time it was made. I don't think it is material.

The Court: For the purposes of this action, it is true, no service was ever made upon the said Alleen S. Mildren at the time of the commencement of this action?

Mr. McWilliams: That is correct, your Honor. That is correct.

I would like at this time to call the clerk back to the stand. [54]

MELBOURNE S. HAMILTON

recalled as a witness herein by the cross-complainant Jessie Mildren, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. McWilliams:

Q. I am showing you the San Bernardino Superior Court file in case No. 68,261, which you have just identified on the stand.

I will refer you to the opinion which was filed February 11, 1953. I will read the first part of it:

"That plaintiff is entitled to a divorce on the ground of extreme mental cruelty.

"That the parties hereto acquired the following Community Property:

"1. Life Insurance Policies (See Defendant's Exhibit 'E')."

Now, will you identify a pen and ink and pencil written document on yellow-lined paper that I am showing you, now?

A. Yes. This yellow tablet paper is a sheet that is used as an exhibit form of receiving exhibits in evidence or for identification in trials of the Superior Court in San Bernardino County.

Q. I will direct your attention to one entry here which is under "Defendant's Exhibit No. E," "Letter dated [55] 11-25-52." Do you have that exhibit with you today?

A. It does not appear to be here.

Q. You have just gone through an envelope full

(Testimony of Melbourne S. Hamilton.)

of exhibits. Are those the only exhibits in this case, that you know of?

A. No. At one time there was an action in the Superior Court in San Bernardino, Actions 75819 and 75818, entitled Alleen S. Mildren versus Paul Mildren and Jessie Mildren. It was consolidated with Action 68261.

Not having been the clerk in either of those actions at that time, it is difficult to say whether this exhibit here as listed, was introduced specifically for the other actions or for this action. I checked the Minute Orders of No. 68261 before coming to Los Angeles this morning on subpoena, and I fail to see any Minute Order returning these exhibits, et cetera, in Action 68261; in other words, I verified what appeared to have been introduced at that time and that appears were in the file upon leaving the Clerk's Office, and I might just take an item, take an item on a check-off list where I checked, to check these off to verify the case numbers. Often they are returned to the parties after conclusion of the actions. Normally, when that is done, there is a withdrawal exhibit slip in the file replacing the exhibit withdrawn.

Q. Then, as I understand it, you think it is possible [56] that you have in your possession in San Bernardino this Exhibit E to which we have referred?

A. Well, it should be in the file here. It is listed on the exhibit list and there is no notation that it has been withdrawn or returned.

(Testimony of Melbourne S. Hamilton.)

Q. Well then, is it your opinion that this exhibit has been lost and cannot be produced?

Mr. Peterson: Just a moment. I object to that on the ground it calls for the opinion and conclusion of the witness.

The Court: Overruled. He is trying to find out.

A. We may misplace an exhibit, but we rarely ever lose one.

Q. (By Mr. McWilliams): Then, do you believe you may be able to find this exhibit?

A. I believe so.

Mr. McWilliams: Your Honor, I wonder if I could have permission to introduce this exhibit, if and when it can be found?

The Court: I will continue the case, counsel. As to these papers that are to come in, I am not going to leave this case open so that you may or may not introduce something, if you happen to find it. If you want me to, I will continue the case until tomorrow so it can be brought in tomorrow, but I am not going to finish the case, close the case, and then after the case has been submitted have you bring in and submit [57] documents when all counsel are not present.

Mr. McWilliams: Well, I would like to have a continuance for the purpose of introducing this Exhibit E, or if we could handle it by stipulation, I am sure counsel would agree to stipulate that it could be introduced at a later date, if it can be found.

Mr. Peterson: I have no idea of what that par-

(Testimony of Melbourne S. Hamilton.)

ticular document is. I don't have any independent recollection of it. I would want to see what it was before I would stipulate to it.

Mr. McWilliams: Well, it is mentioned in this opinion of the court, which states,

"That the parties hereto acquired the following Community Property:

"1. Life Insurance Policies (See Defendant's Exhibit 'E')."

Now, obviously that is a description of it.

The Court: Mr. McWilliams, do you mean to tell me that that is the first time you ever saw or heard of that document?

Mr. McWilliams: I knew there was an opinion in the file, but I was not cognizant at that time and I did not notice that there was a reference to the description of the policies until this morning, that is right, your Honor.

The Court: Well, as I indicated to you, I will cooperate as much as I can with you and I am willing to continue this [58] case until tomorrow so you will have an opportunity tonight or this afternoon to try and find the paper, but I can't, of course, leave a case dangling in the air so that any document that you might have you can submit and make a part of this record. Obviously, you can't put anything in the record, unless all counsel are present. And you don't even know what it is yourself.

Mr. McWilliams: That is correct, your Honor.

I have no further questions at this time.

Mr. Rogers: Before the court makes an order of

(Testimony of Melbourne S. Hamilton.)

continuance, I was wondering if there would be some indication as to how much more evidence counsel has?

The Court: Oh, I don't mean to continue it now. I meant to go ahead and finish your case today. But I take it from what you said a few moments ago, you about have your case in, haven't you?

Mr. McWilliams: I have it in, your Honor.

The Court: So, of course, I am assuming that when all the evidence is in, whether it is now or whether it is this afternoon, then, instead of taking the case under submission I will continue it until tomorrow to give Mr. McWilliams an opportunity to find this evidence that he has in mind.

You might be able to clear up all the rest of it. In other words, there isn't any reason why this afternoon you couldn't get your certified copies of those other documents [59] and put them all in tomorrow morning, so you won't have anything hanging over then.

Mr. McWilliams: I will be glad to do that, your Honor.

Mr. Rogers: That opinion is a rather lengthy document. I don't know whether the clerk could get photostats out in one afternoon or not.

Mr. Peterson: Mr. Hamilton tells me he can go somewhere in town, to a commercial concern and have them photostated. I told him I would give him the money to pay for them and he told me he could get them for me this afternoon. So I think all the

(Testimony of Melbourne S. Hamilton.)

documents I am interested in at least can be photostated by a commercial concern.

The Court: Can you do that this afternoon?

Mr. Hamilton: I believe so, your Honor.

The Court: That would include any document that you want?

Mr. McWilliams: Yes, your Honor.

The Court: All right, Mr. Hamilton can be excused at this time and will return tomorrow.

Mr. Hamilton: Yes.

The Court: And you will return with those documents, and, incidentally, bring the file with you so if there is any question they can compare the documents from the file. Then you will be permitted to take the file back with you tomorrow. [60]

Mr. Hamilton: Very well, your Honor.

The Court: Then you can also see whether you can find this document which Mr. McWilliams is looking for, now, so that in that way you will have everything in the record tomorrow and we won't have anything dangling.

Mr. Rogers: The clerk might even inspect the policies and this item here referred to in connection with the policies and if they have been marked "Withdrawn," then the marking would likely appear on the envelope.

The Court: During the recess you can check on anything in connection with the documents here or anything in evidence. Of course, it may take a little more pouring over that file. All right.

There are no more questions of this witness?

Mr. Peterson: No.

Mr. McWilliams: No.

The Court: You may step down.

Mr. McWilliams: I have finished my case.

The Court: Do you rest?

Mr. McWilliams: Yes.

The Court: Do you have anything, Mr. Rogers?

Mr. Rogers: No, your Honor, nothing.

The Court: All right. You rest, of course, with the understanding that you may reopen for the purpose of offering that document if it is [61] found.

Mr. McWilliams: That is correct, your Honor.

The Court: Do you have anything further, Mr. Peterson?

Mr. Peterson: No, your Honor, not until the conclusion of his case. Of course, there may be some rebuttal that I would require.

The Court: There may be some rebuttal. He has rested.

Mr. McWilliams: Yes.

Mr. Peterson: Except that it can be reopened to offer these documents.

The Court: Oh, yes, for the documents.

Mr. Peterson: And there is one, I don't know what is in it, and naturally I would not want to rest my case altogether until I did know what is in it.

The Court: Obviously you may reopen if there is anything you want to put in after that one document is received.

Are there going to be any arguments?

Mr. McWilliams: Your Honor, I think it would be better to submit it on written arguments.

Mr. Peterson: I would prefer to do so, your Honor.

The Court: All right. It will be continued. Then we will continue it until 9:45 tomorrow morning.

Mr. Peterson: Thank you.

(Whereupon, an adjournment was taken until the following day, Wednesday, June 1, 1955, at 9:45 a.m.) [62]

Wednesday, June 1, 1955; 9:45 A. M.

The Clerk: The Mutual Life Insurance Company of New York vs. Alleen S. Mildren, et al., for further trial.

The Court: You may proceed.

Mr. McWilliams: Has the clerk the photostatic copies?

Mr. Melbourne S. Hamilton: The photostats, sir, will be ready at 11:00 o'clock, if not shortly after noon.

Mr. McWilliams: Well, your Honor, with reference to that exhibit that we tried to find yesterday, I am informed that a complete search has been made by the clerk and by Mr. Peterson, and the only thing that they can tell me is this letter, the letter from the Mutual Life Insurance of New York, does not show to whom it was written or what it was.

Mr. Peterson: Well, the date appears, Mr. McWilliams, on the list of exhibits.

Mr. McWilliams: Yes. It is November 25, 1952, the date of the letter, and I telephoned Mr. Tackabury and he does not have it and has no record of it. So it seems that the letter is not available.

Mr. Peterson: I might state this to the court: I went personally to the Clerk's Office and obtained the services of the Chief Deputy Clerk. We went to Commissioner Haberkern, who was the judge pro tem who tried the case, and examined his notes, and he showed those to us and they [63] indicated that this particular exhibit was a letter from the Mutual Life Insurance Company of New York dated November 25, 1952.

I personally have no recollection of the letter or its contents at this time and nothing in my notes reveals what it is.

The Court: So you just don't have it?

Mr. McWilliams: Just don't have it, your Honor.

The Court: Had you investigated before and had written to the Insurance Company, you might have had a copy of it.

Mr. McWilliams: I might say that the file that was referred to of Mr. Tackabury was supposed to include all the correspondence and documents in connection with it, but it started in 1953, so that indicates the letter was not available and was not back there, because they referred the entire file out here.

The Court: Well, you want to put this over for an hour, is that it? The other papers will not be available for an hour.

Mr. McWilliams: Well, I think the clerk said not for an hour and possibly not until 2:00 o'clock. It might be better to put it over until 2:00.

The Court: I thought he said 11:00 o'clock. It is all right with me.

Mr. McWilliams: Is that right, Mr. Clerk? Are you sure [64] they will be ready?

Mr. Hamilton: He said to come in at 11:00 o'clock and if they weren't ready then it will be shortly after lunch, but he will try to have them by 11:00 o'clock.

Mr. McWilliams: I think it would be better to put it over until 2:00 o'clock.

The Court: He told you to come in at 11:00 o'clock? Is that here in Los Angeles?

Mr. McWilliams: Yes.

Mr. Hamilton: Yes, just here on South Spring Street, your Honor.

The Court: Is that all right?

Mr. Peterson: It is satisfactory. If he can have them shortly after 11:00 o'clock, I would like to conclude this morning, if I can.

The Court: It doesn't make any difference. I am working in chambers. You people can keep coming back, if you want to. Otherwise, we can put it over until 2:00 o'clock. You might come back here at 11:00. I don't care.

Mr. Rogers: As I understand, all the evidence is in; the only thing remaining to be done is to substitute some photostats for certain original documents in this divorce file. It seems to me that is a ministerial act, and the case might well stand sub-

mitted with leave to the clerk to release that file upon receipt of these specified copies. [65]

The Court: That would be true, Mr. Rogers, if we had only one document involved and a certified copy of it was being substituted. We have in the record an entire file and that entire file is not being duplicated.

The attorneys for the parties have agreed. Now, the only thing we want is to have all the attorneys and the parties here when they go in, so that someone is not going to say later, "That was not supposed to go in," or "That is not a true copy of what was supposed to go in."

That is the reason. Of course, if you had all of these copies here now, or if there was just one document that was presently in there and a certified copy of that particular document was coming back, it would be different, but you see, we don't have that, we just have portions of it so that when these documents come back I want all counsel to look at them and I want them to go in and know that there is no objection to them.

Mr. Rogers: I take it, in view of that, then, the court anticipates a withdrawal of this file as an original exhibit.

The Court: Oh, yes, that was the stipulation.

Mr. Rogers: Yes, and then the only evidence of that nature will be these new copies that will be offered when they are available.

The Court: That is right. In accordance with the stipulation, that portion of the file not in evi-

dence will [66] not have duplicates therefor, and will be withmdrawn and will no longer be part of the record. That is a part of the stipulation here.

Mr. McWilliams: Your Honor, there is one other matter: That is that the Mutual Life Insurance Company of New York have requested that the original policies be surrendered to them and withdrawn.

Now, will it be necessary for us to stipulate at this time that the original policies can be withdrawn and returned to the Mutual Life Insurance Company of New York, if copies are substituted?

The Court: Yes, you can. Of course, the original copies can go to them at the time the case is disposed of; or you can stipulate, and they can go to them right now, if the parties want to stipulate that they be withdrawn and copies put in, it is all right with me.

Mr. Peterson: It is my understanding, your Honor, that the Mutual Life Insurance Company will take care of the cost of photostating and I have no objection to further stipulating that upon photostatic copies being filed with the court, the original copies may be withdrawn and delivered to the plaintiff.

Mr. McWilliams: I will join in that stipulation.

The Court: Very well. We will recess, then, until 2:00 p.m. [67]

Mr. McWilliams: Well, if you are going to be working in chambers, if we could just wait until they are ready and then bring them in here?

The Court: It is all right will me, if you agree

among yourselves. The only thing is, of course, the three of you would have to do it.

Mr. Peterson: Yes.

Mr. McWilliams: Yes.

Mr. Rogers: Yes.

The Court: Otherwise, one man might sit here and the other go fishing.

Mr. McWilliams: We will arrange that between ourselves and get them in as soon as we can.

Mr. Peterson: We will advise the bailiff as soon as the photostats are here and he can notify you, then.

The Court: All right. I will just continue it until 2:00 p.m. with the understanding that if you are ready at any time before then, let me know that they are available and we will finish it before 2:00 o'clock.

Mr. Peterson: All right, sir.

(Recess.)

(The court reconvened at 11:30 a.m. on June 1, 1955, and further proceedings were had as follows:)

The Clerk: No. 17253-WB Civil, The Mutual Life Insurance Company of New York vs. Alleen S. Mildren, et al., for [68] further trial.

Mr. McWilliams: Ready, your Honor.

Mr. Peterson: And may it please the court, the cross-defendant Alleen S. Mildren offers as her part of the file the following documents:

Complaint for Divorce.

The Court: Just one second. You have one more?

Mr. McWilliams: Yes, your Honor.

The Court: Well, put that one in and then we will take up the others.

Mr. McWilliams: The defendant and cross-complainant Jessie Mildren offers to substitute a photostatic copy of an opinion in the divorce action in San Bernardino County, entitled Alleen S. Mildren versus Paul Mildren, Case No. 68261, the opinion being dated February 10, 1953, and filed in the action February 11, 1953.

Referring to Page 1, Line 23, there is a reference to "Defendant's Exhibit 'E'." I am offering a stipulation at this time that Defendant's Exhibit E is missing from the court file and that it is stipulated that this Exhibit E is a letter from the plaintiff in this action, The Mutual Life Insurance Company of New York.

Mr. Peterson: Yes, dated November 25, 1952, and that otherwise I don't know to whom it was addressed or by whom received. [69]

Mr. McWilliams: So that is the stipulation, then.

Mr. Peterson: Yes.

Mr. McWilliams: That that is the correct date?

Mr. Peterson: Yes, that is correct.

The Court: Very well. It will be received. That document will be received.

The Clerk: Cross-complainant's Exhibit No. 4.

(The document referred to was marked Cross-Complainant's Exhibit No. 4 and received into evidence.)

Mr. Peterson: The defendant Alleen S. Mildren will stipulate that this is a correct copy and need not be certified by the clerk.

Mr. McWilliams: That is correct. We join in that stipulation.

Mr. Peterson: And on behalf of the defendant and cross-defendant Alleen S. Mildren, we offer in evidence the following documents from the same divorce action:

Complaint for Divorce, filed September 20, 1950;

Answer, filed September 28, 1950;

Cross-Complaint, filed September 28, 1950;

Answer to Cross-Complaint, filed November 2, 1950;

Findings of Fact and Conclusions of Law, filed April 8, 1953.

Do you likewise join the stipulation that these need [70] not be certified, that they are true and correct copies of the originals?

Mr. McWilliams: That is right.

Mr. Rogers: It is so stipulated.

Mr. McWilliams: It is so stipulated.

The Court: Let them be received and marked as one exhibit.

The Clerk: Cross-defendant's Exhibit C.

(The documents referred to were marked Cross-defendant's Exhibit C and received into evidence.)

Mr. Peterson: And we now stipulate that the original file brought here by the clerk may be re-

turned to the clerk and that these documents stand in their place.

Mr. McWilliams: It is so stipulated.

The Court: Very well.

Mr. Peterson: Do you join in the stipulation, Mr. Rogers?

Mr. Rogers: Yes. I think it was clarified earlier today, but it doesn't seem clear to me, now, as to whether the file itself is completely withdrawn and is to be deemed not in evidence at all, except insofar as these photostats have been offered. They constitute the documentary evidence now, is that correct?

The Court: That is correct, the file is withdrawn and is not a part of this record. And those documents which have just been introduced into evidence are certified copies [71] presented by the parties and are the only portions of the file that are in or are presently in evidence here. Return the file to the clerk.

Do both sides rest?

Mr. Peterson: Yes, your Honor.

Mr. McWilliams: Yes, we rest, your Honor.

Mr. Peterson: It was my understanding that the matter is to be submitted on briefs and we would like to ask the court's pleasure in that regard.

The Court: 15, 15 and 5.

Mr. Peterson: It is satisfactory.

Mr. McWilliams: 10, 10 and 5 would be satisfactory to me.

The Court: How is that, 10, 10 and 5?

Mr. Peterson: I would rather have 15 days, if

it is agreeable to the court. I will try to get mine in sooner if I can, but I do have a rather heavy trial calendar.

The Court: If he is going to file his first, I will make it 10, 10 and 5. If he is going to file his first, you will need more time.

Mr. McWilliams: Your Honor, I will be glad to file mine first, if you want me to, and I will promise you to get it in within time.

The Court: All right, you want to file yours first.

Mr. Peterson: It will be 20 days before I have to file [72] the final one.

The Court: There is an advantage of filing afterwards.

Mr. McWilliams: Then, the order is——

The Court: 10, 10 and 5.

Mr. McWilliams: 10, 10 and 5.

The Court: Yes.

Mr. McWilliams: And I will file mine first.

The Court: Yes.

Mr. McWilliams: Thank you.

The Court: Mr. Rogers?

Mr. Rogers: I will not file one unless it is necessary.

I think it would be proper at this time to mention the possibility of the court reaching a decision which would bring my client's interests into play, and I wonder if it would be proper at this time, if that should be the court's conclusion, that that could be indicated preliminarily for the purpose of any

further proceedings that might be necessary to determine what the order should then be?

The Court: Well, I don't know. I don't know just what you mean. I think perhaps what you mean is the possibility that I may determine that neither one of these plaintiffs are entitled to recover. Is that what you mean?

Mr. Rogers: I mean this: If the court should find that the change of beneficiary to Jessie Mildren was not effected, for some reason, then I take it the situation would [73] be that the old beneficiary designations which were in existence prior to that attempt to change would have been in effect at the time of death, and in that event my client would have a claim under some of the policies, but not all.

The Court: It could be that, or it could be one other thing. It might be well for counsel to keep this in mind in their memoranda. I want you to clearly cover this point. It is possible that I may hold that these policies were passed in the divorce proceeding, that all community property interests of Alleen went to the decedent in this divorce proceeding, and that it had the effect of cancelling her out as the beneficiary.

As a matter of fact, I think the law is clear that where policies pass in a divorce proceeding of that kind, the policies on the life of the husband, where the wife is the beneficiary, where the policies go to the husband, the wife is automatically cancelled out as beneficiary.

However, the husband, and even a divorced husband, may, by his action, show that he wishes to

have that divorced wife remain as the beneficiary. So, we will say, as an illustration, and you will find many cases on this in research, where a husband has been divorced but the policy is assigned to him and he continued to pay the premiums on the policy and he clearly indicated to the former wife that he wanted her to be the beneficiary, although no change was made of any kind, [74] and she continued as the beneficiary and legally under the circumstances such as those, she is the beneficiary.

Now, there is a third situation and I spoke to counsel about this at the pretrial, so that steps might have been taken if counsel saw fit, but nothing was done about it and apparently you are satisfied, that is, the possibility that the court may find that these policies went to the husband at the time of the divorce, were assigned to the husband by the Superior Court, which ended the rights of the wife in the property; in other words, she could not take as a right, and the evidence doesn't indicate that he intended that she take by grace, that he didn't intend that she be the beneficiary, but still she remained as the named beneficiary in the policy.

The evidence may show that he indicated that he wanted to change it to Jessie, but he didn't do the thing that was necessary to effect the change to Jessie. So, if he didn't successfully make the change to Jessie, then, of course, it goes to his estate. In other words, it would then go to his estate. So, if it went to his estate, then none of the parties here would be entitled to it, it would go to his estate, and

I assume that his heirs at law are the two boys. He must have left a will.

Mr. McWilliams: Your Honor, the entire estate is disposed of to Jessie in his will, and there has been a will [75] contest, and Jessie has been appointed executrix and the will has been admitted to probate.

The Court: Well, she is not a party to this action as executrix.

Mr. McWilliams: That is right?

The Court: That is one of the things I indicated before, that she should have been made a party as executrix. I don't know. Apparently you are well satisfied, you are satisfied that if an effort was made to name a beneficiary, in this case Jessie, and it is ineffectual solely by reason of not having the policies, then the courts will give effect to that attempted change, that is your position?

Mr. McWilliams: That is right, your Honor.

The Court: I don't know. You may be able to furnish me with the cases that would satisfy me in that connection with what we have here as proof.

Now, I assume that that letter that you have been hunting around for in the last couple of days might be very important on that.

Mr. McWilliams: No, your Honor. I don't feel on that point that this letter is important. I am satisfied that the attempted change of benificiary to Jessie was successful, in spite of the fact that the policies were not secured and I will be glad to cite authorities on that.

The Court: Yes, I realize that. Of course, you realize [76] that you have the burden on that.

Mr. McWilliams: I understand that, and I felt sure enough on it so that I did not feel that I was justified in putting my client to the considerable expense of employing another attorney and having him get familiar with this case and appear in the action.

The Court: You have in the pretrial order, have you not, a stipulation that the attempted change was made?

Mr. McWilliams: We have a stipulation that Dr. Mildren executed and furnished to the Insurance Company——

The Court: A request for change of beneficiary?

Mr. McWilliams: ——a request for change of beneficiary, yes.

The Court: That is what I thought. Where is that?

Mr. Peterson: That was offered in evidence yesterday.

The Court: We don't have to look it up now. At any rate, have it in mind when writing your memorandum.

Mr. McWilliams: Yes, your Honor.

The Court: Because that is a very important point, to convince me that the courts will give effect to an ineffectual effort in the case where the policies themselves are not available to him so that he conformed to the requirements of the insurance company be delivering them to it.

Mr. McWilliams: I will cover that very thoroughly.

The Court: All right. The case is submitted. [77]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled [78] cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of December, 1955.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Endorsed]: Filed January 16, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 189, inclusive, contain the original:

Complaint;
Cross-Complaint;

Answer to Complaint;

Cross-Complaint of Alleen S. Mildren;

Cross-Complaint of Donald L. Mildren;

Answer of Defendant Alleen S. Mildren;

Answer of Defendant Donald L. Mildren;

Answer of Alleen S. Mildren & Donald L. Mildren to Cross-Complaint of Jessie Mildren;

Answer to Cross-Complaint of Donald L. Mildren by Jessie Mildren;

Answer to Cross-Complaint of Alleen S. Mildren by Jessie Mildren;

Answer to Complaint by Paul Anthony Mildren;

Answer of Paul A. Mildren to Cross-Complaint of Jessie Mildren;

Stipulation;

Order Discharging Plaintiff and for Payment of Attorneys' Fees;

Cross-Complainant Jessie Mildren's Pre-Trial Memo;

Cross-Defendant Alleen S. Mildren's & Donald L. Mildren's Pre-Trial Memorandum;

Cross-Complainant Jessie Mildren's Supplementary Pre-Trial Memo;

Demand for Production of Documents;

Pre-Trial Order;

Brief of Cross-Complainant Jessie Mildren;

Brief of Defendants and Cross-Defendants Alleen S. Mildren and Donald L. Mildren;

Reply Brief of Cross-Complainant Jessie Mildren;

Objections to Proposed Findings of Fact in Favor of Cross-Complainant Jessie Mildren;

Findings of Fact in Favor of Cross-Complainant Jessie Mildren (Lodged);

Findings of Fact in Favor of Cross-Complainant Jessie Mildren (Filed);

Judgment in Favor of Cross-Complainant Jessie Mildren;

Notice of Appeal;

Designation of Record on Appeal; and a full, true and correct copy of the Minutes of the Court on May 31, 1955; June 1, 1955; and October 27, 1955; which, together with the original defendant's Exhibits A & C and Plaintiff's Exhibits 1, 2, 3 & 4; and 1 volume of reporter's transcript for May 31, and June 1, 1955, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 3rd day of February, 1956.

[Seal] /s/ JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15029. United States Court of Appeals for the Ninth Circuit. Alleen S. Mildren, and Donald Lee Mildren, Appellants, vs. Jessie Mildren, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 6, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15029

ALLEEN S. MILDREN and DONALD LEE MILDREN,

Appellants,

vs.

JESSIE MILDREN,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANTS

The appellants, Alleen S. Mildren and Donald Lee Mildren, will rely upon the following points to be urged by them in support of their appeal herein.

1. That the trial court erred in determining as is set forth in paragraph 19 of the Findings of Fact and Conclusions of Law (page 13 thereof), that the interlocutory and final decrees of divorce in the action of Alleen S. Mildren, Plaintiff, vs. Paul Mildren, Defendant, in the Superior Court of the State of California in and for the County of San Bernardino, were valid and effective to constitute the insured (Paul Mildren) the sole owner of five policies of insurance which are the subject of the above-entitled action.

2. That the trial court erred in determining in paragraph 19 of the Findings of Fact and Conclusions of Law; that a purported change of benefi-

ciary as to said policies by the insured, Paul Mildren, was valid and effective to change the beneficiary under each of said policies of insurance, and that the defendant, Jessie Mildren, (Appellee herein) is the sole beneficiary under said five policies of insurance and each of them, and is entitled to receive payment of the entire proceeds thereof.

3. That the trial Court erred in determining that the interlocutory and final decrees of divorce in the divorce action hereinabove mentioned were sufficient in law to transfer any title to the insurance policies hereinabove designated for the reason that in said interlocutory and final decrees of divorce, only "Life Insurance Policies" were assigned to the deceased, Paul Mildren, and that such designation was totally ineffective under the terms of the pleadings, findings of fact and conclusions of law and interlocutory and final decrees of divorce therein, to convey, transfer or assign title to any specific life insurance policies.

4. That the trial Court erred in determining that the agreement of the parties dated January 28, 1948, did not transfer title to the insurance policies hereinabove mentioned from the said Paul Mildren, now deceased, to the appellant, Alleen S. Mildren.

5. That the trial Court erred in determining that notwithstanding the community character of the life insurance policies hereinabove mentioned that the deceased, Paul Mildren, could lawfully trans-

fer more than one-half of the proceeds of said policies.

6. That the trial Court erred in failing to find specifically upon the issue as to whether or not the deceased, Paul Mildren, had lawful authority to transfer more than one-half of the proceeds of such policies.

Dated: February 14, 1956.

TAYLOR F. PETERSON,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 15, 1956.

No. 15029

In the
United States Court of Appeals
For the Ninth Circuit

ALLEEN S. MILDREN and
DONALD LEE MILDREN,
Appellants,

vs.

JESSIE MILDREN,
Appellee.

Appellants' Opening Brief

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Appellants' Opening Brief

STATEMENT OF PLEADINGS AND FACTS AS TO JURISDICTION:

This action was filed in the United States District Court for the Southern District of California, Central Division, and was numbered therein Civil Action No. 17253-WB. The action was brought by Mutual Life Insurance Company of New York, a corporation, plaintiff vs. Alleen S. Mildren, Donald L. Mildren, Paul Mildren, Jr., Jessie Mildren and fictitious named defendants. None of the fictitious named defendants were served with summons, and accordingly the action proceeded as will hereinafter be stated between the named defendants.

Jurisdiction of the District Court of Appeal existed under the provisions of Title 28 United States Code, Section 1332 upon the ground that the plaintiff, Mutual Life Insurance Company of New York is a citizen and resident of the State of New York and that each of the defendants is a citizen of one of the states of the United States other than the State of New York, and that the amount in controversy exclusive of interest and costs exceeds the sum of $3,000.00. (Transcript of Record, page 3).

The complaint for declaratory relief and interpleader set forth the facts as follows: That defendant, Alleen S. Mildren, was formerly the wife of Paul Mildren, the insured, named in the five policies of Life Insurance designated in paragraph IV of the Complaint (Transcript of Record, page 5). The defendants, Donald L. Mildren and Paul Mildren, Jr., are the sons of the insured, Paul Mildren; and that the defendant, Jessie Mildren, is the mother of the insured, Paul Mildren, and was originally designated in one policy of insurance as Jessie Wood.

The amount in controversy was $13,634.74 which was paid into the registry of the Court by the plaintiff (Transcript of Record, page 88). Judgment was entered November 30, 1955, and notice of appeal was filed on December 27, 1955, (Transcript of Record, pages 108 to 112 inclusive).

Jurisdiction of the Court of Appeals exists under the provisions of the Judicial Code, Section 128, 28 U.S.C.A. Section 1291, this being an appeal from a

final judgment of the United States District Court. Rules of Civil Procedure, Section 73A.

STATEMENT OF THE CASE

This action was as hereinabove noted commenced by the filing of an action in interpleader and for declaratory relief by the plaintiff, Insurance Company, against the defendants, Alleen S. Mildren, Donald Mildren, Paul Mildren, Jr., and Jessie Mildren, setting forth that the plaintiff, Insurance Company, issued some five policies of life insurance to Paul Mildren, the insured, (Transcript of Record, page 5) as to policy No. 3373875, the beneficiary originally named was William Mildren, father of the insured; that about January 10, 1935, the defendant, Donald L. Mildren, became the beneficiary under certain circumstances; as to policy No. 3377665 the original beneficiary was Jessie Wood, mother of the insured, and now Jessie Mildren, and that about October 16, 1949, the designation of beneficiary was cancelled and the defendant, Paul Mildren, Jr., was named beneficiary under certain circumstances; as to the other three policies, defendant Alleen S. Mildren, was designated as beneficiary with the two children, Donald L. Mildren and Paul Mildren, Jr., named as alternate beneficiaries. (Transcript of Record, pages 5 to 9 inclusive).

The complaint goes on to state that about April 8, 1953, an interlocutory judgment of divorce was entered in an action in the Superior Court of the State of California, in and for the County of San Bernardino,

awarding the plaintiff, Alleen S. Mildren, a decree of divorce from the insured, Paul Mildren, and that the provisions of said decree read in part as follows: "4. That the defendant and cross-complainant (Paul Mildren) be and he is hereby awarded as his sole and separate property the following: ' B. Life Insurance Policies.' 5. That each of the parties be and they are hereby ordered to deliver to the other any of the real or personal property in the possession of the person or party other than the one to whom the same is herein awarded." The final decree of divorce in said action was filed on or about April 12, 1954; that said final decree continued in effect the provisions of said interlocutory decree with respect to the division of property between the parties to said divorce action, to wit, the defendant, Alleen S. Mildren and said insured, and specifically the portions of the interlocutory decree quoted hereinabove in this paragraph. (Transcript of Record, pages 9 and 10).

The complaint proceeds to allege that on or about June 17, 1953, the insured, Paul Mildren, executed and there was thereafter furnished to the plaintiff a further and additional request for change of beneficiary under the said five policies of insurance and each of them; and that said insured designated as his intended beneficiary under each of said policies of insurance defendant, Jessie Mildren, described in the request of beneficiary as the mother of the insured; that each of the policies of insurance contained a provision to the effect that the right to a change of the beneficiary

was reserved solely to the insured with the exclusion of the beneficiary, and that any change of beneficiary thereunder should be effective only upon endorsement of the same on such policy of insurance by the plaintiff; that with respect to any changes of beneficiary to the defendant, Jessie Mildren, none of the policies of insurance was submitted to the plaintiff for endorsement and alleges upon information and belief that the reason the insured did not deliver the policies to the plaintiff was because the same were in the possession of the defendant, Alleen S. Mildren. (Transcript of Record, pages 10 to 12 inclusive).

The complaint proceeds to aver that the plaintiff did not know whether the interlocutory and final decrees of divorce were valid and effective to constitute the insured the sole owner of the policies as his sole and separate property, whether the attempted or purported change of beneficiary hereinabove referred to was valid and effective to change the beneficiary in the absence of endorsement of such change by the plaintiff on each of said policies of insurance; that Jessie Mildren claims that the interlocutory and final decrees of divorce were valid and effective and that Jessie Mildren is the sole beneficiary under the policies of insurance and entitled to the receipt of payment of the entire proceeds; that defendant, Jessie Mildren, has demanded payment by the plaintiff of the entire proceeds under each of the policies of insurance; that defendant, Alleen S. Mildren, claims that the aforesaid attempted or purported change of beneficiary referred to in paragraph XI of plaintiff's complaint was

invalid and ineffective by reason of the incompetence of the insured at the time of the execution of purported or attempted change of beneficiary, and by reason of the fact the change was never endorsed on any of the said policies of insurance; that defendant, Alleen S. Mildren, claims that she now is and remains the primary beneficiary under three of said policies of insurance; and that the defendants, Donald L. Mildren, and Paul Mildren, Jr., claim or may claim as contingent beneficiaries under two policies of insurance; that certain additional claims were made by the defendants, Donald L. Mildren and Paul Mildren, Jr.; that an actual controversy consists between plaintiff and defendant by reason of the provisions of the policies of insurance as to who is entitled to receive payment of all or a portion of the proceeds of the insurance policies, and that the claims, contentions and interests of each and all of defendants are conflicting that plaintiff does not know and cannot safely determine for itself whether one or more of the respective claims, contentions and interests are valid, and cannot safely make payment to any one or more of the defendants of the whole or any part of the insurance proceeds; that accordingly the plaintiff, insurance company, deposited with the registry of the Court the entire proceeds of the policies of insurance. The prayer followed that the defendants be ordered to deliver up the policies of insurance to the Court; that it be determined which if any of the parties might be entitled to receive the proceeds of the same; and that the plaintiff be discharged from liability. (Transcript of Record, pages 11 to 21 inclusive).

Jessie Mildren filed a cross-complaint in which she avered the issuance of the policies upon various dates from October 22, 1924, to and including February 19, 1940; averring that changes of beneficiary had occurred as hereinabove stated; averring the existence and nature of the interlocutory decree of divorce referred to above; that the insured, Paul Mildren, demanded delivery of the policies of insurance to him, but that delivery had been refused; she averred the making of an order to show cause in the Superior Court of the State of California, in and for the County of San Bernardino, on or about January 13, 1954, seeking to punish the defendant, Alleen S. Mildren, for failing to deliver the policies, and averring that the Superior Court had made an order determining that Alleen S. Mildren had in her possession certain life insurance policies which are the same as those designated above; and that Alleen S. Mildren was adjudged guilty of contempt for failure to deliver the policies; that no service of order adjudging Alleen S. Mildren to be in contempt was ever served upon her. The cross-complaint further averred that on or about June 17, 1953, the insured, Paul Mildren, executed and delivered to the plaintiff a further and additional request to change the beneficiary under the five policies of insurance herein involved, and in which he designated the said Jessie Mildren as his beneficiary. (Transcript of Record, pages 22 to 32 inclusive.)

The cross-complaint proceeds to aver that the interlocutory and final decrees of divorce and the order

adjudging Alleen S. Mildren to be in contempt were valid and effective to constitute the insured sole owner of the policies of insurance, with the change of beneficiary referred to as valid and effective to change the beneficiary to Jessie Mildren. (Transcript of Record, pages 32 to 34 inclusive).

The answer to the complaint filed by Jessie Mildren was to the same effect. (Transcript of Record, pages 36 to 38 inclusive).

Alleen S. Mildren, one of the appellants herein, filed a cross-complaint averring that the plaintiff had paid the moneys into court with the intent that the parties be decreed to litigate between themselves their rights as to the policies. It averred the commencement of the divorce action hereinabove referred to, and contains this specific averment, paragraph VI (Transcript of Record, page 40). "That the divorce action was prosecuted to final judgment in the above-entitled Superior Court; that under and by virtue of the terms of the judgment entered therein there was awarded to the said Paul Mildren "life insurance policies"; that no other or further designation in said interlocutory judgment of divorce as to life insurance policies was contained in said decree.

That in the cross-complaint of Paul Mildren filed in the divorce action, it was alleged under oath by Paul Mildren, now deceased, that the parties in said action owned and possessed as community property the following: "C—Life Insurance Policies"; that said life insurance policies were not in said cross-complaint

designated with any greater particularity than as hereinabove set forth; and that the cross-complaint and interlocutory judgment of divorce were and each of them was so vague and indefinite as to be void for uncertainty and totally unenforceable so far as the possession and ownership of the life insurance policies were concerned; that the interlocutory judgment of divorce has become final, and that the judgment of divorce did not by or in any of its terms change, alter or modify any of the terms of the interlocutory judgment of divorce. The cross-complaint alleges the invalidity of the change of beneficiary, and as a second and distinct cause of action it averred that at the time and place, when and where the deceased, Paul Mildren, made or attempted to make a change of beneficiary he was not then and there of sound mind, but was incompetent by reason of mental and bodily infirmities. (Transcript of Record, pages 39 to 43 inclusive.)

Donald L. Mildren filed a cross-complaint only as to policy No. 3373875 to the effect that he was entitled to receive the proceeds of the same, and also that he was the contingent beneficiary named in the other policies of insurance described in plaintiff's complaint, and that Jessie Mildren was entitled to no interest of, in and to the policies or the proceeds or avails thereof. The answers of Alleen S. Mildren and Donald L. Mildren to plaintiff's complaint were in general accord with the allegations set forth in their cross-complaint. (Transcript of Record, pages 44 to 56 inclusive).

Alleen S. Mildren and Donald L. Mildren, jointly filed an answer to the cross-complaint of Jessie Mildren and averred, admitted and denied as follows:

Admitted that defendant and cross-defendant, Alleen S. Mildren had in her possession the policies of life insurance described in plaintiff's complaint, and in other pleadings; denied that her holding of the same was in violation of or contrary to the terms of the interlocutory decree of divorce; admitted the issuance of the order to show cause; admitted the making of the contempt order hereinabove referred to; averred that the order so made was beyond the jurisdiction of the Superior Court; and denies that Alleen S. Mildren held the policies in violation of any valid order. (Transcript of Record, pages 56 to 59 inclusive). The answer to the cross-complaints of Alleen S. Mildren and Donald L. Mildren was in substantial accordance with the cross-complaint of Jessie Mildren. (Transcript of Record, pages 60 to 67 inclusive).

An Order was made on January 7, 1955, discharging the plaintiff from liability, awarding attorneys fees to plaintiff's attorneys, and requiring the parties to litigate between themselves. (Transcript of Record, pages 67 to 72 inclusive).

It was averred by all parties and not disputed that Paul Mildren, the insured, died on or about July 21, 1954, in Los Angeles, California.

A Pre-Trial Order was made stipulating to the following facts:

(1) The insured, Paul Mildren, is the son of Jessie Mildren; the father of Donald L. Mildren and Paul Mildren, Jr.; and was the husband of Alleen S. Mildren until the marriage was dissolved by divorce.

(2) A divorce action was filed by Alleen S. Mildren, as plaintiff, against the said Paul Mildren, in the Superior Court of the State of California, in and for the County of San Bernardino, Action No. 68261, on September 20, 1950; an interlocutory decree of (116) Divorce was made and entered in said action on April 8, 1953, in Judgment Book 121, page 75, and which contained in part the following language:

There is hereby set aside and awarded to the defendant and cross-complainant as his sole and separate property:

(a) The trailer.
(b) Life insurance policies.
(c) Cash in the sum of $7800.00.

"5. That each of the parties be and they are hereby ordered to deliver to the other any of the real or personal property in the possession of the person or party other than the one to whom the same is herein awarded."

(3) A final decree of divorce was made and entered in said divorce action on April 12, 1954, in Book 125, Page 28 of Judgments.

(4) On December 2, 1953, in said divorce action at the request of Paul Mildren, an order to show cause why Alleen S. Mildren, should not be punished for

contempt for her failure, among other things, to turn over to Paul Mildren the following described insurance policies was issued by the Superior Court of San Bernardino County:

#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren.

399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.

Five policies, #3373,875 - 3377,665 - 3707,187 - 5448,542 - 5586,988, in the Mutual Life Insurance Company of New York, on life of Paul Mildren, Sr.

Said order to show cause was served on Alleen S. Mildren on December 4, 1953, by a deputy of the Sheriff of the County of San Bernardino.

(5) A certified copy of the said interlocutory decree in said divorce action was served on Alleen S. Mildren by the Sheriff's (117) office of San Bernardino County on December 23, 1953.

(6) On January 13, 1954, in said divorce action at the request of Paul Mildren, the Court issued an order to show cause why Alleen S. Mildren should not be punished for contempt for her failure to turn over to Paul Mildren the following described life insurance policies:

#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren.

#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.

Five policies, #3373,875 - 3377,665 - 3708,187 - 5488,542 - 5586,988 in the Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.

(7) Said order to show cause issued on January 13, 1954, was served by the Sheriff's Office of San Bernardino County on Alleen S. Mildren on January 14, 1954.

(8) A trial was held before said Superior Court on January 25 and 26, 1954, at which time some four separate matters were heard by the Court. These included:

1. An action brought in claim and delivery by Alleen S. Mildren against Paul Mildren and Jessie Mildren to recover certain personal property, said to have been converted by Paul Mildren and Jessie Mildren to their own use, which resulted in a judgment in favor of the defendants.

2. An action for forcible detainer for waste and for value of use and occupation of premises brought by Alleen S. Mildren against Paul Mildren and Jessie Mildren, which resulted in a judgment in favor of the defendants.

3. An action to enjoin and restrain the Sheriff of San Bernardino County from proceeding to sell certain property of the plaintiff Alleen S. Mildren, which had been levied upon by the Sheriff in an attempt to enforce the provisions of the (118) judgment referred to

herein above, wherein and whereby the defendant Paul Mildren was awarded cash in the sum of $7800.00. A judgment in favor of the defendant in that action followed.

4. A proceeding in contempt based on the order to show cause hereinabove set forth and which resulted in the issuance of an order in action No. 68261 as follows:

> "Plaintiff is guilty of contempt because of her failure to deliver possession of the following described insurance policies to defendant and plaintiff is hereby ordered to deliver the following described policies to defendant as his sole and separate property or in the alternative to deliver them to the Clerk of the above entitled Court to be held until this order becomes final either by lapse of time or on decision on appeal:
>
> "#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren,
>
> "#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.,
>
> "Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988 in the Mutual Life Insurance Company of New York on life of Paul Mildren, Sr.
>
> "Upon the delivery of said policies to defendant, plaintiff will be purged of her contempt."

(9) No service of said order was ever made upon the said Alleen S. Mildren.

(10) There was executed by the said Paul Mildren and introduced in evidence in said action No. 68261, a deed and property settlement agreement wherein said Paul Mildren transferred to the said Alleen S. Mildren all property contained in the home property which was then located at 346 North Mango Street, Fontana, California, and which has now been re-numbered 8208 Mango Street, Fontana, California.

(11) The Findings of Fact signed and filed in connection (119) with the trial of said order to show cause on May 7, 1954, by the Superior Court of the State of California, in and for the County of San Bernardino, in the said divorce action found among other things:

> "Plaintiff (Alleen S. Mildren) has in her possession the following described life insurance policies which were awarded to defendant (Paul Mildren) in the interlocutory judgment of divorce rendered herein and which now belong solely and exclusively to the defendant (Paul Mildren) and to which he is entitled to possession:
>
> "#397674A1, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Donald Lee Mildren.
>
> "#399418, Lincoln National Life Insurance Company of Fort Wayne, Ind. on life of Paul Mildren, Jr.,
>
> "Five policies, #3373,875, 3377,665, 3708,187, 5448,542, 5586,988 in the Mutual Life Insurance Company of New York on life of Paul Mildren, Sr."

(12) All of the judgments, decrees and orders referred to in said divorce action have become final and none of them have ever been appealed, vacated or modified in any way.

(13) On or about April 12, 1954, Robert McWilliams as attorney for the said Paul Mildren, wrote and delivered through the United States mail to Attorney Taylor F. Peterson a letter in the following words:

> "Dear Mr. Peterson:
>
> As I understand your last letter, the only part of the decision made by Judge Curtis which you are contesting is the one with reference to the unlawful detainer action.
>
> I assume, therefore, that you will be willing to turn over the life insurance policies to me for Dr. Mildren. (120)
>
> If I am correct, please let me know how you want to handle this, if you want to mail them to me or just how you want them delivered.
>
> Very truly yours,"

(14) The said Attorney Taylor F. Peterson on or about April 19, 1954, wrote and delivered through the mail to said Robert McWilliams a letter as follows:

> "Dear Mr. McWilliams:
>
> This will acknowledge receipt of your letter dated April 12, 1954.
>
> I do not have the life insurance policies in my possession. Mrs. Mildren has, and she has not as yet given me instructions as to what she wished me to do. After judgment has been entered and

Notice of Entry of Judgment is sent me, it will probably be necessary for me to consult with her again to see whether she desires to file Notice of Intention to move for a new trial, or to appeal or whether she intends to comply with the order.

With regard to the matter of the personal property, I instructed Mrs. Mildren to have it delivered to the Fontana Van & Storage Company, trailer included, and for Fontana Van & Storage Company, in turn, to notify you or Dr. Mildren when the property had been received by them. This will, I think, take care of this situation.

Thank you for your courtesy in this matter, I am,

Very truly yours,"

(15) On or about June 17, 1953, the said Paul Mildren executed and delivered to The Mutual Life Insurance Company of New York written requests for change of beneficiaries, requesting that the beneficiaries on all policies involved in this suit be changed to Jessie Mildren as the mother of the insured. (121)

The issues of law to be determined by the Court were set forth at length in the Pre-Trial order which appears on pages 82 and 83 of the Transcript of Record and which read as follows:

(1) Were the insurance policies, which are the subject of the present action, delivered and transferred by Paul Mildren, deceased, to Alleen S. Mildren so that title to said policies passed to her on or about January 28, 1948?

(2) Did the interlocutory and final decrees and

the Order made on trial of the orders to show cause in action No. 68261 in the Superior Court of the State of California in and for the County of San Bernardino operate to transfer title to the policies of insurance which are the basis of the present action to the said Paul Mildren?

(3) In the event that the decree did not transfer title to any policies to the defendant Paul Mildren, were the policies community property? Were they paid for from earnings of the parties namely Alleen S. Mildren and Paul Mildren, and as to the cross-defendant, Donald L. Mildren, did the policy in his favor pass to him upon the death of his father?

(4) In the event the Court finds that the decree of divorce did not transfer title to the policies to Paul Mildren, did Paul Mildren make a valid gift of his one-half interest in the policies of his mother Jessie Mildren? (123)

(5) Is Alleen S. Mildren entitled to all the proceeds of the policies because of the fact that no change of beneficiaries was ever effected?

(6) Was the attempted change of beneficiary on all of said policies invalid because of the failure to endorse on the policy contract such changes?

(7) Did the Mutual Life Insurance Company of New York, plaintiff herein, waive the requirement that a change of benefiiciary should be attached to and endorsed upon the policies by filing this interpleader suit?

(8) Was the requirement of attaching the request for change of beneficiary to the insurance policies excused because the policies were not available and could not be obtained by the insured Paul Mildren?

THE ORAL PROCEEDINGS

At the trial defendant and cross-defendant, Alleen S. Mildren, testified that she and Paul Mildren, Sr., were married July 23, 1926, and the two children were born the issue of said marriage named Paul Anthony Mildren born September 21, 1928, and Donald Lee Mildren, born October 31, 1932, and that the insurance policies which are involved in this action were obtained during the period of their marriage. (Transcript of Record, pages 115 and 116). That during the month of January, 1948, Alleen S. Mildren and Paul Mildren, now deceased, executed a document relating to their property rights. This document was marked cross-defendants Exhibit A and received into evidence. (Transcript of Record, pages 117 and 118, and page 120). This document appears as defendant's exhibit A in the documents certified to by the Clerk. (See pages 181 to 183 of the Transcript of Record). The witness testified that at the time the documents were executed Paul Mildren's mother had them and deceased agreed to bring them to Alleen S. Mildren as soon as he came out again. It was testified to that approximately a year or two previous to January 28, 1948, decedent had been living with his mother in Los Angeles and came to the home of the parties at 346 North Mango Street, Fontana, only on weekends. (Transcript of Record, page 126); that following the execution of the agreement (Alleen Mildren's Exhibit A) he brought the life insurance policies involved in this action to the witness at her home in Fontana, contained in a big, heavy shopping bag; that the policies remained in the living

room of the Fontana home until the following Monday at which time deceased and witness took the policies to a neighbor, Mrs. Maycock, for safe keeping while witness was to go to San Francisco and visit, but upon her return she obtained the policies from Mrs. Maycock and put them in the vault. (Transcript of Record, pages 127 to 128 inclusive); that at the time of delivering the policies deceased said "this is your Social Security"; that the source of the funds to pay the premiums on the policies were monies earned jointly by witness and deceased. Deceased was an osteopathic physician and surgeon. (Transcript of Record, page 128) and that the policies had always been in the possession of Alleen S. Mildren. On behalf of Alleen S. Mildren the following documents were offered and received in evidence as a single exhibit and appear in the certificate of the clerk with the Transcript of Record. Complaint for divorce in the Superior Court action San Bernardino County filed September 29, 1950, answer filed September 28, 1950, Cross-Complaint filed September 28, 1950, answer to Cross-Complaint filed November 2, 1950, Findings of Fact and Conclusions of Law filed April 8, 1953; all these documents were annexed together as cross-defendant's Exhibit C and were received in evidence. (Transcript of Record, page 170).

Donald Lee Mildren testified he knew when the document (Alleen S. Mildren's Exhibit A) was executed the latter part of January, 1948; that some time in February his father, the deceased, Paul Mildren, Sr., brought the policies to the Mango Street home in a

shopping bag on Friday or Friday evening, and that he knew his mother and father took the policies to the home of Mrs. Maycock. (Transcript of Record, pages 140 and 141).

That the witness, Mrs. Edith V. Maycock, testified that the policies were brought to her home by deceased and Alleen S. Mildren in the early part of February, 1948, and that they were in her possession for a few days. (Transcript of Record, pages 142 to 145 inclusive).

STATEMENTS OF POINTS RELIED UPON BY APPELLANTS

1. That the trial court erred in determining as is set forth in paragraph 19 of the Findings of Fact and Conclusions of Law (page 13 thereof), that the interlocutory and final decrees of divorce in the action of Alleen S. Mildren, Plaintiff, vs. Paul Mildren, Defendant, in the Superior Court of the State of California, in and for the County of San Bernardino, were valid and effective to constitute the insured (Paul Mildren) the sole owner of five policies of insurance which are the subject of the above-entitled action.

2. That the trial court erred in determining in paragraph 19 of the Findings of Fact and Conclusions of Law; that a purported change of beneficiary as to said policies by the insured, Paul Mildren, was valid and effective to change the beneficiary under each of said policies of insurance, and that the defendant, Jessie Mildren, (Appellee herein) is the sole beneficiary under said five policies of insurance and each of

them, and is entitled to receive payment of the entire proceeds thereof.

3. That the trial court erred in determining that the interlocutory and final decrees of divorce in the divorce action hereinabove mentioned were sufficient in law to transfer any title to the insurance policies hereinabove designated for the reason that in said interlocutory and final decrees of divorce, only "Life Insurance Polices" were assigned to the deceased, Paul Mildren, and that such designation was totally ineffective under the terms of the pleadings, findings of fact and conclusions of law and interlocutory and final decrees of divorce therein, to convey, transfer or assign title to any specific life insurance policies.

4. That the trial court erred in determining that the agreement of the parties dated January 28, 1948, did not transfer title to the insurance policies hereinabove mentioned from the said Paul Mildren, now deceased, to the appellant, Alleen S. Mildren.

5. That the trial court erred in determining that notwithstanding the community character of the life insurance policies hereinabove mentioned that the deceased, Paul Mildren, could lawfully transfer more than one-half of the proceeds of said policies.

6. That the trial court erred in failing to find specifically upon the issue as to whether or not the deceased, Paul Mildren, had lawful authority to transfer more than one-half of the proceeds of such policies.

THE FINDINGS AND JUDGMENT

The trial court made Findings of Fact in favor of cross-complainant, Jessie Mildren, to the effect that Jessie Mildren was entitled to the proceeds of the policies of insurance by reason of the fact that the interlocutory and final decrees of divorce and the Court Order referred to in paragraphs 10 through 15 inclusive of the Findings (Transcript of Record, pages 95 to 100 inclusive), to change the beneficiary under the policies of insurance were valid and effective, and that Jessie Mildren is the sole beneficiary under each of said policies of insurance and each of them is entitled to receive payment of the entire proceeds thereof. (Transcript of Record, pages 103 and 104). Judgment followed that the Clerk be ordered to pay to Jessie Mildren the balance of the money which was paid to the registry of the Court by the plaintiff in the net amount of $12,865.24 after payment of attorneys' fees and costs to plaintiff, and that the insurance policies be cancelled and declared to be of no further force and effect, and that all parties be perpetually enjoined and restrained from instituting or prosecuting a suit or proceeding in respect to said insurance policies. (Transcript of Record, pages 108 to 111 inclusive).

ARGUMENT

The following matters appear to counsel to be uncontrovertible upon the basis of the record as the same has heretofore been outlined:

1. That the insurance policies were the community property of Paul Mildren, deceased, and Alleen Sara Mildren, Defendant, cross-complainant and cross-defendant herein.

2. That in the divorce action in the Superior Court San Bernardino County, the only allegation made in the pleadings and the only language appearing in the Findings of Fact and Conclusions of Law and interlocutory judgment of divorce was that "Life Insurance Policies" were transferred to Paul Mildren, now deceased.

3. That under the terms and conditions of the agreement Alleen S. Mildren's Exhibit A, the real property consisting of the home in Fontana and all personal property then in the home was transferred to Alleen S. Mildren.

4. That the insurance policies were then within the contemplation of the parties as being included in the transfer of property which was then contained in the house.

5. That the insurance policies were at all times after February, 1948, in the possession of Alleen S. Mildren, and that no effort was made between the date of the interlocutory judgment of divorce which was April 8, 1953, until January 13, 1954, at which time the

deceased, Paul Mildren, having changed attorneys as appears on the documents on file herein, did obtain the issuance of an order to show cause.

6. That no motion or other proceedings were had in the Superior Court having for its purpose the amending or correcting of the interlocutory decree of divorce so as to specify the policies with particularity.

I.

It is, of course, the general rule that judgments are to be enforced, and that all reasonable inferences which may be drawn from the language of the judgment are to be taken into account in determining what the judgment actually provided.

City of Winter Haven vs. A. M. Klemm & Son,
132 Florida 334, 181 So. 153.

On the other hand the Court may not by construction add new provisions to a judgment which were omitted or withheld in the first instance. *Butler vs. Denton,* 150 Fed. 2nd 687. Under California law which, of course, must be considered by the Federal Courts in construing property rights between residents of the same state, it has been held that judgments as to property are fatally defective where they fail to describe with certainty the lands or properties affected. *People vs. Rio Nido Company, Inc.,* 29 Cal. App. 2nd 486; 85 Pac. 2nd 461.

The validity of a judgment is to be determined as of the date of its rendition, and it is not validiated and made operative by subsequent proceedings based on the

judgment. *Langston vs. Nash,* 192 Georgia 427, 15 So. Eastern 2nd 481; *Winn vs. Armour & Co.,* 184 Georgia 769; 193 S. E. 447. Accordingly such recitals in the Findings of Fact and Conclusions of Law and Judgment in the instant case with regard to the effect of the Contempt proceedings cannot be held to breathe life into a dead or void provision of the judgment. It has been held that a description such as the one herein involved "Life Insurance Policies" is too indefinite to give the Court any power to enforce the judgment. *Walsh vs. Smith,* 45 Cal. 230; *Kelley vs. McKibben,* 53 Cal. 13; *Cooke vs. Aguirre,* 86 Cal. 479; *Stevens vs. Superior Court,* 7 Cal. 2nd 110 at 112; 59 Pac. 2nd 988. (No Pacific Reporter Citations on the first three cases).

We have here a situation where a deceased who was represented by counsel in the divorce action chose to rely upon the language in his answer and cross-complaint (Alleen S. Mildren's Exhibit C) that what he sought to recover were life insurance policies without any more specific allegation. There was undoubtedly some duty upon him to supply this specific information to the Court if his counsel deem the findings as proposed to be defective. Decedent had at that time the right, privilege, and duty to object to the findings; if his objections were not sustained to move for a new trial; and to appeal if his motion for a new trial were denied. *Hathaway vs. Ryan,* 35 Cal. 187; (No Pacific Reporter Citation) *Estate of Perry,* 64 Cal. App. 21, 220 Pac. 321; *Sweet vs. Hamilothoris,* 84 Cal. App.

775, 258 Pac. 652; *Combs vs. Eberhardt,* 120 Cal. App. 25, 7 Pac. 2nd 338; *Moore vs. Craig,* 5 Cal. App. 2nd 283, 42 Pac. 2nd 647. It was held in the latter two cases that when no objection to the findings was made when the findings were served on the losing party such party has waived his right to object to their uncertainty.

It may be further claimed that the opinion of the trial court which is contained in Jessie Mildren's Exhibit 2 may be used to supply some deficiency. The decisions of the Courts of California are to the contrary. *Boas vs. Bank of America,* 51 Cal. App. 2nd 592, 125 Pac. 2nd 620; *Lord vs. Katz,* 54 Cal. App. 2nd 363, 128 Pac. 2nd 907; *Berger vs. Stiner,* 72 Cal. App. 2nd 208, 164 Pac. 2nd 559; *Wuest vs. Wuest,* 72 Cal. App. 2nd 101, 164 Pac. 2nd 32; *Williams vs. Kinsey,* 74 Cal. App. 2nd 583, 169 Pac. 2nd 487; *Offer vs. McMillan,* 101 Cal. App. 2nd 840, 226 Pac. 2nd 380; *Gantner vs. Gantner,* 39 Cal. 2nd 272, 246 Pac. 2nd 923; *Larson vs. Thoreson,* 116 Cal. App. 2nd 790, 254 Pac. 2nd 656.

CONCLUSION UPON THIS SUBJECT

It is accordingly submitted that the findings and interlocutory judgment of divorce in the divorce action were insufficient to transfer title to any policies whatever since the description contained in the findings and interlocutory decree failed to describe any ascertainable property and that accordingly the judgment must be construed as leaving unascertained and undistributed community property which was not disposed of in the divorce action.

II.

The trial court erred in determining in paragraph 19 of the findings of fact and conclusions of law (Transcript of Record, pages 103 and 104) that the purported chance of beneficiary as to the policies by the insured Paul Mildren was valid and effective to change the beneficiaries under each of said policies of insurance and that the defendant Jessie Mildren, Appellee herein, is the sole beneficiary under said five policies of insurance and each of them and entitled to receive the entire proceeds thereof.

Under California Law although the husband has management and control of the community personal property (Civil Code Section 172) he may not make a valid gift of the proceeds of life insurance polices purchased with community funds in excess of fifty per cent. *Martinez vs. Hudson,* 14 Cal. App. 2nd 42, 57 Pac. 2nd 970; *Mazman vs. Brown,* 12 Cal. App. 2nd 272, 55 Pac. 2nd 539; *Estate of McNutt,* 36 Cal. App.

2nd 542, 98 Pac. 2nd 253; *Modern Woodmen of America vs. Gray,* 113 Cal. App. 729, 299 Pac. 754; *New York Life Insurance Co. vs. Bank of Italy,* 60 Cal. App. 602, 214 Pac. 61; *Ballinger vs. Ballinger,* 9 Cal. 2nd 330; 70 Pac. 2nd 629; *Fields vs. Michael,* 91 Cal. App. 2nd 443, 205 Pac. 2nd 402. From the foregoing it follows that the trial court was in error in determining that these policies which constituted undisputed community assets were transferred in their entirety to Jessie Mildren by virtue of the purported change of beneficiary.

III.

The trial Court erred in determining the agreement dated January 28, 1948, did not transfer title of the insurance policies from Paul Mildren, deceased, to Appellant, Alleen S. Mildren.

Under California Law a husband and wife even without a separation may contract each other concerning their respective property rights (Civil Code of California, Section 158) *Perkins vs. Sunset Telephone & Telegraph Co.,* 155 Cal. 712, 103 Pac. 190; in the absence of a violation of the general rules on confidential transactions, the Court has no power to disapprove an agreement which divides community property or which transmutes such property into separate property or separate property into community property. *Adams vs. Adams,* 29 Cal. 2nd 621, 177 Pac. 2nd 265; *Majors vs. Majors,* 70 Cal. App. 2nd 619, 161 Pac. 2nd 494.

And where the parties have acquiesced in such a division; have delivered the property to each other,

and no action is taken to set it aside for a considerable period of time the agreement is fully and finally binding. So far as this proceeding is concerned it clearly appears that the agreement of January 28, 1948, was before the trial court in the divorce action and was not disapproved. The uncontradicted evidence described above to the effect that the time of signing the agreement the deceased Paul Mildren, told his wife he would bring out the insurance policies the next time he came out; that he fulfilled his promise and delivered the policies to her is strongly persuasive evidence that the intention of the parties was to make a present transfer of the policies from deceased to Alleen S. Mildren on January 28, 1948; that this was a fully executed transaction. There is no evidence to the contrary, and no reasonable inference may be drawn from any of the testimony in the case that a gift was not intended at that time. The mere fact that at the time of the divorce proceeding the husband changed his mind and attempted to regain possession of the policies cannot alter the effect that what he did at the time of the execution of the agreement and immediately thereafter. Where a donor uses clear and unambiguous language showing a clear intent to make a gift and a belief on his part that he has done all that is necessary to complete it, the act of delivery if slight and ambiguous will be aided thereby. *Leitch vs. Diamond National Bank,* 83 Atl. 416, 234 Pa. 557. We have here exactly the opposite situation from that which existed in the case of *Union Mutual Life Insurance Co. vs. Broderick,* 196 Cal. 497, 238 Pac. 1034, as in that case although the wife claimed a gift was

made to her, the policy was in fact delivered to decedent's sister, and he actually executed a change of beneficiary as to the policy during the time the same was in his possession, and at a time when he was able to do so. In this case, no delivery of the policies was made to anyone but the appellant, Alleen S. Mildren, herein. In the cited case, the delivery of the policy to the sister was held to constitute an effectual transfer of the proceeds of the policy. Here we have a transfer of possession made directly from the husband to the wife, and the policies were thereafter held by her. Accordingly it is respectfully submitted upon this point alone that appellant, Alleen S. Mildren is entitled to the entire proceeds of the insurance policies here involved.

IV.

The Court erred in determining that notwithstanding the community character of the life insurance policies herein above mentioned that the deceased Paul Mildren, did lawfully transfer more than one-half of the proceeds of said policies. As we have seen above, if, as contended by appellant and under the authorities cited, the insurance policies represented undistributed community property, the trial court was without authority to determine that the deceased, Paul Mildren, could make a gift of more than one-half of the proceeds of said policies. Section 164 of the Civil Code of California which was in force at the time of the death of deceased and which had been in force for many years in its then form during the married life of the parties

hereto, provides in part as follows:—"All other property acquired after marriage by either husband or wife or both including real property situated in this state and the personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domicile in this state, is community property. Section 161A of the same code provides as follows: "The respective interests of the husband and wife in community property during continuance of the marriage relation are present existing and equal interests under the management and control of the husband as is provided in Sections 172 and 172A of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property." Section 172 of the same code provides: "the husband has the management and control of the community personal property with like absolute power of disposition other than testamentary as he has of his separate estate; *provided however that he cannot make a gift of such community personal property or dispose of the same without a valuable consideration*, or sell, convey or encumber the furniture, furnishings or fittings of the home, or the clothing or wearing apparent of the wife or the minor children that is community without the written consent of the wife." Section 172A, referred to above in Section 161A of the Code relates only to real property and the same will not be repeated here.

As pointed out above, a life insurance policy purchased with community funds is community property,

and the husband is without authority in any manner to transfer more than one-half of the proceeds of any such policies.

This question was squarely before the court in accordance with the terms of the pre-trial order (Transcript of Record, page 82(3)). Findings Nos. 18 and 19 (Transcript of Record, pages 102 to 104 inclusive) are the findings upon which the judgment was based, and are, of course, squarely opposed to the statutory provisions referred to in this assignment of error.

It is submitted that under the authorities hereinabove set forth in regard to this matter, the action of the Court in determining that there was a complete transfer of the right to the proceeds of the policies, is contrary to both the evidence and the law.

V.

The trial court erred in failing to find specifically upon the issue as to whether or not the deceased, Paul Mildren, had lawful authority to transfer more than one-half of the proceeds of such policies. This issue was tendered under issues of law ((3) pages 82 and 83 Transcript of Record). It may, of course, be said that where other findings made necessarily negative the right of the objecting party to a judgment in his favor, it is not necessary to make findings upon such issue. The answer to this is that this was a material issue squarely before the court under the pre-trial order as has been shown hereinabove, and that an omnibus finding that material allegations in named para-

graphs of defendant's affirmative defense were not proved, was insufficient to support the judgment. *Gordon vs. Beck,* 196 Cal. 768, 239 Pac. 309. The omnibus finding to which appellants object is contained in paragraph 22 of the findings. (Transcript of Record, pages 104 and 105) as follows: "Except as otherwise expressly found all the allegations contained in the plaintiff's complaint and in the cross-complaint of Jessie Mildren are true; except as otherwise expressly found all the allegations contained in the cross-complaint of Alleen S. Mildren and Donald L. Mildren and in the answers of Alleen S. Mildren and Donald L. Mildren to the plaintiff's complaint and to Jessie Mildren's cross-complaint are false." It is submitted that under these authorities cited this is an insufficient finding upon which the judgment can be based, and particularly that it is insufficient as a finding upon the issues raised as to the community character of the policies; the issue as to whether they were undistributed community property; and the issue as to whether or not the deceased had the right to make a valid gift of more than one-half of the community interest in the policies of insurance. It is submitted that upon this ground alone a reversal should follow.

CONCLUSION

It is accordingly submitted that inasmuch as the Court erred in determining:—

I.

That the provisions of the interlocutory and final decrees of divorce in the action of *Mildren vs. Mildren* in the Superior Court of San Bernardino County were valid and effective to constitute the insured the sole owner of the policies of insurance;

II.

In paragraph 19 of the findings of fact and conclusions of law, that the purported change of beneficiary upon said policies by the insured was valid and effective to change the beneficiary to the defendant, Jessie Mildren, appellee herein, and that she was entitled to receive payment of the entire proceeds of the policies;

III.

That a purported change of beneficiary as to said policies by the insured, Paul Mildren, was valid and effective to change the beneficiary under each of said policies of insurance, and that the defendant, Jessie Mildren, is the sole beneficiary under said policies and is entitled to receive payment of the entire proceeds thereof;

IV.

That the interlocutory and final decrees of divorce were sufficient in law to transfer any title to the insur-

ance policies hereinabove designated when the only designation as to said policies in said decrees was "Life Insurance Policies";

V.

That the agreement of the parties dated January 28, 1948, coupled with their subsequent conduct did not transfer title to the insurance policies from Paul Mildren, deceased, to the appellant, Alleen S. Mildren;

VI.

That notwithstanding the community character of the life insurance policies hereinabove mentioned, the deceased, Paul Mildren, could lawfully transfer more than one-half of the proceeds of said policies;

VII.

And in failing to find specifically upon the issue as to whether or not the deceased, Paul Mildren, had lawful authority to transfer more than one-half of the proceeds of such policies;

That the findings of fact and conclusions of law and judgment are and each of them is clearly erroneous, to the prejudice of the rights of the appellants, and that the judgment should be reversed and remanded.

All of which is,

Respectfully submitted,

TAYLOR F. PETERSON
Attorney for Appellants.

No. 15029

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEEN S. MILDREN and DONALD LEE MILDREN,

Appellants,

vs.

JESSIE MILDREN,

Appellee.

APPELLEE'S BRIEF.

ROBERT McWILLIAMS,
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TABLE OF AUTHORITIES CITED

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IN THE

United States Court of Appeals

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ALLEEN S. MILDREN and DONALD LEE MILDREN,

Appellants,

vs.

JESSIE MILDREN,

Appellee.

APPELLEE'S BRIEF.

Statement of Pleadings and Facts as to Jurisdiction.

The statement under this heading contained in the appellants' brief is hereby approved and adopted for the purpose of this brief.

Statement of the Case.

The facts stated under the above heading in appellants' brief are true and correct and are adopted for the purpose of this brief.

Summary of Facts.

The facts stated by appellant are correct but they are stated at such length that a summary of the material facts seems to be in order. Paul Mildren purchased from

plaintiff five life insurance policies on his life during his marriage to Alleen. In 1948 Paul and Alleen executed an agreement transferring certain community property to Alleen as her separate property. Alleen secured an interlocutory decree of divorce from Paul in the San Bernardino County Superior Court in 1953. This decree held that certain property was the separate property of Alleen because of the 1948 agreement. Other property was held community property of the parties and part of it was assigned to Alleen and part to Paul. Among the property assigned to Paul was "life insurance policies." In 1954 Alleen was held in contempt by the divorce court for her refusal to deliver to Paul the five policies involved in this action. All of the proceedings leading to the contempt order described the policies in great detail. No appeal was ever taken from the divorce decree or the contempt order and both have become final.

At the time of the interlocutory decree, April 8, 1953, Alleen was beneficiary on the policies. On June 17, 1953, Paul filed with the insurance company a change of beneficiary blank requesting that the beneficiary on all of the policies be changed to his mother, Jessie Mildren.

Paul died July 21, 1954, without having secured the policies from Alleen and Alleen and Jessie both made claim to the death benefits. The insurance company filed this interpleader action and the trial court awarded the death benefits to Jessie and Alleen filed this appeal.

ARGUMENT.

Appellants' brief lists six points but there is overlapping and repetition in the statement so we are summarizing her argument as an introduction to our answer.

The divorce court tried to assign the policies to Paul. However, appellant argues that the court failed because the description of the policies in the decree was void for uncertainty.

Therefore, appellant takes the position that the policies were not affected by the divorce decree and remained either the separate property of Alleen under the 1948 agreement or else the community property of Paul and Alleen. Counsel argues that if the policies were the separate property of Alleen, then Paul could not give the death benefits to Jessie by changing the beneficiary. Or if the policies are the community property of the parties, then Paul could give only one-half of the death benefits to Jessie by changing the beneficiary.

I.

The Interlocutory Divorce Decree Was Effective to Transfer the Insurance Policies Involved in This Action to Paul Mildren and to Cut Off the Interests of Alleen Mildren.

The informal opinion of the trial judge in the divorce action found that the "life insurance policies (see defendant's Exhibit E)" were community property and awarded them to the husband, Dr. Paul Mildren. [Jessie Mildren's Ex. 4.] It was stipulated at the time of the trial of this case that "defendant's Exhibit E" was a

letter from The Mutual Life Insurance Company of New York, plaintiff in this action. Obviously it was referred to for a description of the life insurance policies. The opinion directed Mr. Taylor F. Peterson as plaintiff Alleen's attorney and who is also Alleen's attorney in this case to prepare the interlocutory decree and he prepared it on his own stationery (see photostatic copy of the interlocutory divorce decree). [Jessie's Ex. 2.] However, he omitted the reference to "defendant's Exhibit E". Exhibit E has mysteriously disappeared from the divorce files and is not now available. [Tr. of Record, pp. 160-162, 168.] It was obviously referred to for a more complete description of the life insurance policies as undoubtedly any letter from the life insurance company would refer to the policy numbers of the policies about which the letter was being written.

Now it is the contention of Mr. Peterson that he prevented the interlocutory decree from transferring the policies by omitting the policy numbers and thereby making the part of the decree awarding the life insurance policies void for uncertainty. On this basis he claims for his client over $13,000.00 that the court tried to award to the husband, Dr. Paul Mildren.

It is our contention that the interlocutory decree did transfer the policies to Dr. Paul Mildren.

The decree awards "the life insurance policies" to the husband, Dr. Paul Mildren. By this language alone, even without referring to the other documents in the file, it is apparent that the court was referring to all of the life insurance policies owned by the parties. If the court had wanted to award one or several but not all, then the court would obviously not have used this language

but would have indicated which life insurance policies were intended.

It is admitted that the life insurance policies involved in this action were community property of the parties and there is nothing shown in the evidence or arguments that could be the basis for any doubt that these policies involved in this action were intended to be included in the words "the life insurance policies."

It is, of course, apparent that the court intended to award some property to Paul Mildren by these words and if possible some effect should be given to this provision.

> "It is a well established rule that an interpretation upholding the validity of a judgment is favored * * *."
>
> *Tonnesen v. Tonnesen* (1954), 126 Cal. App. 2d 132, 271 P. 2d 534.

The description of personal property in a judgment or decree is sufficient if it identifies the property so that it can be complied with. The parties to this agreement knew what life insurance policies they had and there could be no uncertainty between them as to what this provision meant. Appellant has never even suggested that there was any actual uncertainty or doubt as to what life insurance policies were intended. She bases her claim squarely and frankly on an alleged technical defect introduced into the judgment of the court by appellant's attorney. As she testified at the trial, Alleen S. Mildren had the policies continuously from 1948 until they were produced by her and put in evidence at this trial. [Tr. of Record, p. 130.]

> "It is true that findings, as well as the judgment based thereon, should be definite and certain. At

> least they should be sufficiently clear and definite to enable a party to comply with their requirements. * * * as between the parties to this action, we believe the findings and judgment, in this respect, are sufficiently clear and definite to enable defendant to comply with its requirements. * * *."
>
> *Kittle v. Lang* (1951), 107 Cal. App. 2d 604, 237 P. 2d 673.

If there had been any doubt as to which policies were intended, Mr. Peterson would have found out and made it clear when he drew the interlocutory decree. Furthermore, if there had been any doubt as to which policies were intended, Mr. Peterson would have raised the issue at the time of the trial on the order to show cause and he would have appealed the order of the court holding his client in contempt for her failure to turn over the life insurance policies which were completely described with policy numbers in the order. At least he would have made a motion for a new trial.

If there had been any doubt about which insurance policies were intended by the interlocutory decree, or if Mr. Peterson had believed that the decree was void for uncertainty, he would not have written the letter set forth in the pre-trial order at page 79, Transcript of Record.

There was not the slightest doubt or uncertainty on the part of anyone connected with the divorce action, including the parties and their counsel, which policies were described by the decree. It is significant that no attempt was ever made to change the description of the policies in the interlocutory decree and no objection to the description of the policies was ever made in connection with the contempt proceeding—it shows very clearly that there

was no uncertainty on the part of anyone what policies were described in the interlocutory decree.

There can be no doubt that the interlocutory decree description was "sufficiently clear and definite to enable the plaintiff (Alleen) to comply with its requirements."

The parties always dealt with the policies as a unit. Alleen testified at the time that her husband brought all the policies to the home place in a shopping bag. All the policies were taken together to Mrs. Maycock and all of the policies were taken from Mrs. Maycock to the safety deposit box. [Tr. of Record, pp. 126-128.]

> "A construction adopted or acquiesced in by the parties will not be changed without strong reason."
>
> *Parten v. First National Bank and Trust Co.*, 283 N. W. 408, 204 Minn. 200, 120 A. L. R. 862.

See also

> Annotation at 120 A. L. R. 868.

It is true that some descriptions of property in a decree are void for uncertainty and some descriptions are not. The courts of California have set up a test to be applied in each case to the facts to determine whether the description of property is so uncertain that the judgment is void or whether the description is sufficiently certain so that the judgment is valid. This test is set forth in *Kittle v. Lang* (1951), 107 Cal. App. 2d 604, 237 P. 2d 673, quoted above. Appellant has not referred to this test in her opening brief. If this test is applied to the facts of this case, there can be no doubt that the description was sufficiently clear to enable the parties to comply with the decree.

II.

The Agreement of 1948 Did Not Transfer the Insurance Policies to Alleen.

At the trial an agreement dated January 28, 1948, between Paul and Alleen was introduced as Alleen's Exhibit "A". This agreement had not been mentioned in any of the pleadings but it was mentioned in the pre-trial order. It is now appellant's contention that this document transferred the life insurance policies to Alleen as her separate property and that they have been her separate property ever since.

By the terms of this document, it is agreed that the real property located in Fontana, which constituted the home of Alleen and Paul, would be deeded to Alleen. The deed was executed and recorded the next day, January 29, 1948. [See opinion Jessie's Ex. 4.] The agreement provides that "on the execution of this agreement, the first party (Alleen) shall have and hold said real property (the home of the parties), together with all personal property that may be located thereon as her sole and separate property * * *." This is the only language in the agreement that could in any way refer to the insurance policies involved in this case.

In other words, it might be contended that the insurance policies were "personal property that may be located thereon" and if so, it was transferred to Alleen. However, according to the testimony of Alleen herself at the trial of this case, these policies were not "located" on the "said real property" * * * "upon the execution of this agreement (January 28, 1948)." Alleen testified that when the agreement was signed, the policies were somewhere else—she got the impression that Paul's

mother, Jessie, had the policies. Then, according to her testimony, about two weeks after the agreement was executed, Paul brought the policies in a shopping bag to the home of the parties, and the policies stayed on the "said real property" for a period of two or three days, and then they were taken to Mrs. Maycock, and about six days later Alleen took them to a bank safe deposit vault in San Bernardino. Accordingly, the only time, according to the testimony, that the policies were ever "located" on the "said real property" was a period of two or three days about two weeks after "the execution of this agreement." [Tr. of Record, pp. 126-128.]

Appellant does not seriously contend in her opening brief that the language of the agreement would transfer the policies. The language of the agreement is not quoted or referred to and no effort is made to show how it could refer to the insurance policies. In the opening brief, pages 30 to 31, counsel seems to base his claim not so much on the agreement as on the circumstances of delivery of the policies to Alleen. At the time, the parties were married and Alleen was the named beneficiary of the life insurance policies. It was decided to place the policies in a safety deposit vault at the bank in San Bernardino and Paul brought the policies out for that purpose. He brought them out to the family home in a bag containing "a great big heart-box of candy. He took the candy out and just left the policies right in the bag, right in the livingroom." At the time Paul brought the policies out to the family home, he said to Alleen, "This is your Social Security." [Tr. of Record, p. 128.] The policies were put in the safety deposit box and left there without any effort to endorse or change the life ownership of the policies. It is submitted that

the policies were community property and that they remained community property and nothing in the testimony of Alleen would indicate that there was any change in their character or ownership.

A further consideration which would indicate that it was not the intent of the parties to change the ownership of the policies was that the policies were not sent to the insurance company for endorsement to show any change in ownership and no notice was given to the insurance company of any assignment. On the other hand, it was the intent of the parties to transfer the real estate and a deed was duly executed and recorded transferring the real estate. If it had been the intent of the parties to transfer the policies, they would have followed the same necessary formalities just as they did in regard to the real estate.

The agreement was received in evidence and interpreted in the Superior Court of San Bernardino County in the divorce action and even though there had been any question whether the policies were transferred by the property settlement agreement, the decision in the divorce action would be *res adjudicata* on the question. The court found that the agreement transformed the real property into separate property of the wife, Alleen, and also found that the life insurance policies were community property of the parties and awarded them to the husband, Paul. [Refer to opinions, orders, findings, decrees and judgments in the divorce action introduced at the trial as Jessie's Exs. 2 and 4.]

III.

The Request for Change of Beneficiary Executed and Delivered to the Insurance Company Was Effective to Change the Beneficiary to Jessie Mildren on All Insurance Policies Involved in This Action.

At the trial it was suggested by the court that the interlocutory divorce decree might be effective to transfer the life insurance policies to the husband, Dr. Paul Mildren, and to cut off all rights of the former beneficiaries. And at the same time the request for change of beneficiary might not be effective to change the beneficiary to Jessie Mildren, the insured's mother. In this case the death benefits would be payable to the estate of the husband, Dr. Paul Mildren.

We believe that this possibility is disposed of by the fact that the request for change of beneficiary was effective to change the beneficiary to Jessie Mildren. The only reason suggested in the pleadings and pre-trial memorandums why the request for change of beneficiary might not be effective is that the policies require that any change of beneficiary be endorsed on the policies and in this case the request for change of beneficiary was submitted to the life insurance company by itself and the policies were never produced so that the life insurance company could not endorse the changes thereon.

This omission to furnish the policies of life insurance for endorsement is excused on two different grounds:

A. The Requirement of the Policies That Any Change of Beneficiary Should Be Endorsed on the Policy Was Excused by the Fact That the Policies Were Not Available and Could Not Be Secured by the Insured.

The testimony and the pleadings show that the life insurance policies were in the possession of Alleen S. Mildren continuously from 1948 until she produced them at the time of trial and they were introduced into evidence. [Tr. of Record, p. 130.] The stipulation of facts also shows that the insured not only demanded the policies but that he prosecuted contempt proceedings which resulted in an order holding Alleen S. Mildren in contempt for her failure to turn over the policies to the insured, Dr. Paul Mildren. The stipulated facts also show that she still refused to turn the policies over even after she was held in contempt for her failure to do so. The record makes it abundantly clear that the policies were not available and that the insured, Dr. Paul Mildren, went to great lengths in his efforts to get possession of them. [Tr. of Record, pp. 74-80.]

A complete and exhaustive annotation of this question is found starting at 19 A. L. R. 2d 5. It is stated in this annotation at page 73,

> "Where the insured does everything in his power to effect a change of beneficiary, the mere fact that he is unable to surrender the policy for endorsement of the change by the insurer because it is inaccessible under the circumstances will not render the change invalid." (Cases in eight jurisdictions are cited as authority for this statement.)

Applying California law, it was also held in *Pacific Mutual Life Insurance Co. v. Rotondo,* 96 Fed. Supp.

197, affirmed in 191 F. 2d 624, that the failure to have the change of beneficiary endorsed on the policy of life insurance is excused by the inaccessibility of the policy.

The rule of law is well settled that it is not even necessary to prove a demand for the policies in order to excuse failure to endorse the change of beneficiary on them if the policies are in the possession of the original beneficiary. (19 A. L. R. 2d 72, art. 29.)

B. The Provision Requiring That Any Change of Beneficiary Must Be Endorsed on the Policies Is a Provision for the Benefit of the Insurance Company and the Company Waived This Requirement by Filing This Interpleader Action.

It is true that the policies in this action provided that any change of beneficiary must be endorsed on the policies to be effective. However, this provision of the policy is for the benefit of the insurance company and may be waived by the insurance company. While there is a conflict of authority as to whether the insurance company can waive this provision after the death of the insured, still all of the California cases hold that filing of an interpleader action by the insurance company waives the requirements of the policy as to method of change of beneficiary so that the original beneficiary cannot claim the benefit of any such provision if the insured has done all that he could reasonably do to change the beneficiary. (*Johnston v. Kearns* (1930), 107 Cal. App. 557, 290 Pac. 640; *Aetna Life Ins. Co. v. Wood* (1934), 2 Cal. App. 2d 579, 38 P. 2d 853; *Shaw v. Johnson* (1936), 15 Cal. App. 2d 599, 59 P. 2d 876.)

IV.

If the Policy Is Community Property, Then It Should Be Delivered to the Executrix of the Last Will of the Husband, Paul Mildren, Deceased.

Appellant suggests the possibility that the court might hold that this policy was still community property at this time. Then she states the rule that the husband cannot make a gift of community property in excess of 50%. If the proceeds are community property, then they are subject to administration in the husband's estate and should be delivered to his executrix. (Calif. Prob. Code, Sec. 202.) If the surviving wife has any claim to the proceeds on the basis of her community property rights, then the claim must be enforced through the probate court, and this court has no jurisdiction to decide to whom the community property should be distributed out of the estate of Paul Mildren, deceased.

> "The court in probate has always exercised jurisdiction over the interest of the surviving wife in the community property in the course of administration upon the estate of a deceased husband. No one of the powers of the court in probate is more firmly settled or more universally conceded and acted upon than this one."
>
> *Colden v. Costello* (1942), 50 Cal. App. 2d 363, 122 P. 2d 959.

V.

The Failure of the Trial Court to Find Whether Paul Had Lawful Authority to Transfer More Than One-half of the Insurance Proceeds Will Not Require Reversal.

We are somewhat uncertain as to just what counsel is complaining of in his 5th argument at pages 33 and 34 of his brief.

The statement is made that the court failed to find specifically on issue No. 3, pages 82 and 83 of the Transcript of Record which reads as follows:

> "(3) In the event that the decree did not transfer title to any policies to the defendant Paul Mildren, were the policies community property? Were they paid for from earnings of the parties, namely Alleen S. Mildren and Paul Mildren, and as to the cross-defendant Donald L. Mildren, did the policy in his favor pass to him upon the death of his father?"

The court found all the facts upon which its judgment is based specifically and in great detail and then found the conclusion:

> "The aforesaid interlocutory and final decrees of divorce and the said court order set forth in Paragraphs X through XV herein were valid and effective to constitute said insured the sole owner of said five policies of insurance as his separate property; * * *." [Tr. of Record, p. 103.]

Having found that the decree did transfer title to the policies to Paul, the issue No. 3 quoted above was fully answered and it became an idle act to go on and find what the situation would have been if the decree had not transferred title to Paul.

Conclusion.

In conclusion we submit that the divorce decree and subsequent proceedings and orders constituted the life insurance policies the separate property of Paul Mildren and that Paul made a valid designation of beneficiary to his mother, Jessie, and that the death proceeds should be paid to Jessie.

Respectfully submitted,

ROBERT MCWILLIAMS,

Attorney for Appellee, Jessie Mildren.

No. 15031

United States Court of Appeals

for the Ninth Circuit

Estate of HERBERT B. MILLER, Deceased, UNITED STATES NATIONAL BANK OF PORTLAND, (Oregon), Administrator, d.b.n., c.t.a.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court of the United States.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.–4-13-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

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The Tax Court of the United States

Docket No. 28582

Estate of HERBERT B. MILLER, Deceased, UNITED STATES NATIONAL BANK OF PORTLAND, (Oregon), Former Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Amended to Read

Estate of HERBERT B. MILLER, Deceased, THE UNITED STATES NATIONAL BANK OF PORTLAND (Oregon), Administrator, d.b.n., c.t.a.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

See Order of 12/28/50.

DOCKET ENTRIES

1950

May 29—Petition received and filed. Taxpayer notified. Fee paid.

June 1—Copy of petition served on General Counsel.

1950

July 17—Motion to dismiss for failure properly to prosecute, filed by General Counsel.

July 18—Hearing set Aug. 3, 1950, on Respondent's motion.

Aug. 3—Hearing had before Judge Kern on respondent's motion to dismiss, upon oral request of petitioner proceeding continued.

Aug. 3—Order, hearing on respondent's motion to dismiss is continued to 9/6/50, Washington, D. C., entered.

Sept. 1—Motion for leave to file attached amended petition, amended petition lodged, filed by taxpayer.

Sept. 6—Hearing had before Judge Kern on respondent's motion to dismiss, denied.

Sept. 6—Order, that respondent's motion to dismiss is denied, petitioner's motion is granted, amended petition is filed this date, entered.

Sept. 7—Copy of order, motion and amended petition served on General Counsel.

Sept. 27—Motion to dismiss for lack of jurisdiction filed by General Counsel.

Oct. 20—Hearing set Nov. 8, 1950, on respondent's motion.

Nov. 6—Motion for continuance to early part of December, 1950, filed by taxpayer. Granted to December 6, 1950.

1950

Dec. 5—Motion for leave to file the attached second amended petition, second amended petition lodged, filed by taxpayer.

Dec. 5—Order, petitioner's motion is granted and amended petition filed this date, respondent's motion to dismiss filed Sept. 27/50, is denied, proceeding stricken from Dec. 6, 1950, calendar entered.

Dec. 5—Second amended petition filed by taxpayer.

Dec. 8—Copy of order, motion and second amended petition served on General Counsel.

Dec. 28—Answer filed by General Counsel.

Dec. 28—Request for hearing in Portland, Oregon, filed by General Counsel.

Dec. 28—Motion to change caption filed by respondent.

Dec. 28—Order, that caption is changed to read: "Estate of Herbert B. Miller, deceased, The United States National Bank of Portland (Oregon), Administrator, d.b.n., c.t.a.," entered.

1951

Jan. 3—Notice issued placing proceeding on Portland, Oregon, calendar. Service of answer and request made.

1952

Apr. 15—Hearing set June 30, 1952, Portland, Oregon.

May 14—Entry of appearance of David S. Pattullo and George W. Miller, as counsel filed.

1952

May 14—Motion for continuance filed by taxpayer. 5/15/52. Granted.

1953

Mar. 23—Hearing set July 6, 1953, Portland, Oregon.

June 10—Motion to continue from the July 6, 1953, Portland calendar filed by petitioner. 6/11/53. Granted.

1954

June 29—Hearing set Oct. 11, 1954, Portland, Oregon.

Oct. 11 &

Oct. 12—Hearing had before Judge Raum on the merits, petitioner's oral motion to consolidate with docket 31063—Granted. Stipulation of facts filed, Petitioner's brief due Nov. 26, 1954; Respondent's brief due Dec. 27, 1954; petitioner's reply due Jan. 17, 1955.

Oct. 29—Transcript of Hearing 10/11/54 filed.

Nov. 22—Motion for extension to 1/3/55 to file Petitioner's Brief; 2/2/55 to file Respondent's Brief; 2/22/55 Petitioner's Reply Brief, filed by taxpayer. 11/23/54—Granted.

1955

Jan. 3—Motion for extension to 1/10/55 to file Petitioner's Brief; Respondent's Brief 2/9/55, and until 3/1/55 to file Reply Brief, filed by taxpayer. 1/3/55—Granted.

Jan. 10—Brief filed by taxpayer. Copy served.

1955

Jan. 25—Motion for extension to Feb. 28, 1955, to file answer brief filed by General Counsel. 1/27/55—Granted.

Feb. 28—Answer Brief filed by General Counsel.

Mar. 14—Motion for extension to April 1, 1955, to file reply brief, filed by taxpayer. 3/23/55 —Granted.

Apr. 4—Reply Brief filed by taxpayer. 4/4/55. Copy served.

Aug. 23—Findings of Fact and Opinion filed. Judge Raum, Decision will be entered for the respondent. Copy served.

Aug. 24—Decision entered, Judge Raum, Div. 11.

Nov. 17—Petition for review by U. S. Court of Appeals for the Ninth Circuit, filed by petitioner.

Nov. 21—Proof of Service filed.

Dec. 6—Statement of Points with acknowledgment of service thereon, filed by petitioner.

Dec. 6—Designation of Contents of Record with acknowledgment of service thereon, filed by petitioner.

Dec. 7—Designation of Additional Portions of Record with statement of service by mail thereon filed by respondent.

Dec. 20—Order extending time to Feb. 15, 1956, for filing the record and docketing the appeal, entered.

The Tax Court of the United States

Docket No. 31063

Estate of HERBERT B. MILLER, Deceased, THE UNITED STATES NATIONAL BANK OF PORTLAND (Oregon), Executor of Said Estate, Administrator De Bonis Non With Will Annexed of Said Estate, as Distributee-Trustee of Said Estate, and Individually,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Estate of HERBERT B. MILLER, Deceased, THE UNITED STATES NATIONAL BANK OF PORTLAND (Oregon), Administrator, d.b.n., c.t.a.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Amended Caption 1/17/51.

DOCKET ENTRIES

1950

Oct. 19—Petition received and filed. Taxpayer notified. Fee paid.

Oct. 20—Copy of petition served on General Counsel.

1950

Dec. 12—Motion to change caption filed by General Counsel.

Dec. 12—Answer filed by General Counsel.

Dec. 12—Request for hearing in Portland, Oregon, filed by General Counsel.

Dec. 14—Hearing set Jan. 17/51, Washington, D. C., on respondent's motion.

Dec. 19—Notice issued placing proceeding on Portland, Oregon, calendar. Service of answer and request made.

1951

Jan. 17—Hearing had before Judge Kern on respondent's motion to change caption—Granted.

Jan. 17—Order amending caption to read "Estate of Herbert B. Miller, Dec'd, The United States National Bank of Portland (Oregon), Administrator, d.b.n., c.t.a.," petitioner, entered.

1952

Apr. 15—Hearing set June 30, 1952, Portland, Oregon.

May 14—Motion for continuance filed by petitioner. 5/15/52—Granted.

1953

Mar. 23—Hearing set July 6, 1953, Portland, Oregon.

June 10—Motion for a continuance filed by taxpayer. 6/11/53—Granted.

1954

June 29—Hearing set October 11, 1954, Portland, Oregon.

Oct. 11 &

Oct. 12—Hearing had before Judge Raum on the merits on Petitioner's oral motion to file amended petition, no objection by respondent, and on Petitioner's oral motion to consolidate dockets 28582 and 31063. Both motions granted, Respondent given 10 days to file reply. First amended petition —(Copies served), and Stipulation of Facts filed at hearing, Petitioner's brief due 11/26/54; Respondent's brief due 12/27/54 and Petitioner's reply due 1/17/55.

Oct. 11—Copy of first amended petition served on General Counsel.

Oct. 18—Answer to first amended petition filed by General Counsel, at Portland, Oregon.

Oct. 18—Copy of answer to first amended petition, filed at Portland, Oregon, served.

Oct. 29—Transcript of Hearing 10/11/54 filed.

Nov. 22—Motion for extension to Jan. 3, 1955, for Petitioner's Brief; Feb. 2, 1955, for Respondent's Brief; and Feb. 22, 1955, to file Petitioner's Reply Brief filed by taxpayer. 11/23/54—Granted.

1955

Jan. 3—Motion for extension to 1/10/55 for Petitioner's Brief, 2/9/55, Respondent's Brief, and until 3/1/55 for Reply Brief, filed by taxpayer. 1/3/55—Granted.

Jan. 10—Brief filed by taxpayer. Copy served.

Jan. 25—Motion for extension to Feb. 28, 1955, to file answer brief filed by General Counsel. 1/27/55—Granted.

Feb. 28—Answer Brief filed by General Counsel.

Mar. 14—Motion for extension to file reply brief, filed by taxpayer. 3/23/55—Granted.

Apr. 4—Reply Brief filed by taxpayer. Copy served.

Aug. 23—Findings of Fact and Opinion filed. Judge Raum, Decision will be entered for the respondent. Copy served.

Aug. 24—Decision entered, Judge Raum, Div. 11.

Nov. 17—Petition for Review by U. S. Court of Appeals for the Ninth Circuit, filed by petitioner.

Nov. 21—Proof of Service filed.

Dec. 6—Statement of Points with acknowledgment of service thereon filed by petitioner.

Dec. 6—Designation of Contents of Record with acknowledgment of service thereon, filed by petitioner.

Dec. 7—Designation of Additional Portions of Record with statement of service by mail thereon, filed by respondent.

Dec. 20—Order extending time to Feb. 15, 1956, for filing the record and docketing the appeal, entered.

The Tax Court of the United States

Docket No. 28582

Estate of HERBERT B. MILLER, Deceased, THE UNITED STATES NATIONAL BANK OF PORTLAND (Oregon), Former Executor of Said Estate, Executor of Said Estate, Administrator De Bonis Non with Will Annexed of Said Estate, as Distributee-Trustee of Said Estate, and Individually,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SECOND AMENDED PETITION

The above named petitioner, leave of Court having been first obtained, hereby files its Second Amended Petition, and hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Seattle IT:90D:HWF), dated February 28, 1950, and as a basis of its proceedings, alleges as follows:

I.

Herbert B. Miller died testate on February 13, 1948. The United States National Bank of Portland (Oregon), was appointed Executor of the estate of said decedent on February 17, 1948. On or about May 21, 1949, The United States National

Bank of Portland (Oregon), filed with the Commissioner of Internal Revenue formal notice of its fiduciary capacity for petitioner-taxpayer pursuant to the Internal Revenue Code, Section 312(a). On or about July 14, 1949, the administration of the estate was completed and the United States National Bank of Portland (Oregon) was discharged as Executor. The United States National Bank of Portland (Oregon), did not give the Commissioner of Internal Revenue formal notice of the termination of its fiduciary capacity pursuant to Section 312(b), of the Internal Revenue Code. That at all times and dates herein mentioned The United States National Bank of Portland (Oregon), was and now is the duly appointed, qualified and acting Executor of said estate, and has been and is now acting in a fiduciary capacity with respect to said estate, assuming all of the powers, rights, duties and privileges of said petitioner-taxpayer with respect to the taxes imposed by the Internal Revenue Code, or within the meaning of Section 312 of the Internal Revenue Code. On or about July 14, 1949, the entire residuary estate subject to minor specific bequests, was distributed under the terms of the Last Will and Testament of said decedent to The United States National Bank of Portland (Oregon), as trustee under the Last Will and Testament of said decedent. Petitioner is still acting as such trustee and is in possession of the residuary assets of decedent's estate. On October 9, 1950, the Circuit Court of the State of Oregon for the County of Multnomah, Department of Probate, reopened said

estate and the petitioner was duly appointed administrator de bonis non with will annexed of decedent's estate. The return of the calendar year 1946 was filed with the Collector of Internal Revenue at Portland, Oregon.

II.

The notice of deficiency, a copy of which is attached and made a part of this petition by reference, is dated February 28, 1950.

III.

The tax in controversy is income tax for the calendar year 1946 for which a deficiency of $1,882.27 is asserted.

IV.

The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1. The Commissioner of Internal Revenue erred in determining an increase in dividend income of $5,105.74.

2. The Commissioner of Internal Revenue erred in determining a decrease to capital gains for the calendar year 1946 in the amount of $3,984.17.

V.

The facts upon which the petitioner relies as a basis of this proceedings are as follows:

1. Miller Paint Co., Inc., was duly organized and incorporated under the laws of the State of Oregon in May, 1946.

2. The facts and circumstances leading up to the decision to organize Miller Paint Co., Inc., were as follows:

(a) A desire to form a business entity to assure the continuity of the business upon the death of one of the partners whose decease was imminent due to advanced cancer.

(b) To remove from the paint business a portion of the assets of the two partners who had no issue so as to permit the division among the employees of the paint business upon the death of said partners without disturbing the continuity of management and without bequeathing the entire estate to such employees.

(c) To take out of and set aside from the interest of the partner whose death was imminent, a portion of the net value of the paint business.

(d) To simplify the administration of the estate of any partner.

3. All of the authorized capital stock of the said corporation was subscribed for and paid for in cash.

4. In June, 1946, Miller Paint Co., Inc., acting through its directors, purchased certain assets from the deceased taxpayer and others and tendered short term notes in payment thereof. Said notes were ac-

5. The purchase made by the said corporation cepted by deceased taxpayer and others.

was on the basis of fair market value at the time of the purchase.

6. The gain realized by the deceased taxpayer on the said sale was reported by him as a long-term capital gain.

7. No securities were ever issued by the corporation other than the original capital stock which was paid for in cash.

8. The payments claimed by the Commissioner to be divided income were payments made upon interest and principal of said notes.

9. No dividend had been declared by the directors of Miller Paint Co., Inc., prior to the payments designated by the Commissioner as dividend income.

10. The purchase of the said assets by Miller Paint Co., Inc., was a sound and reasonable business transaction and the payment of the notes used therein was reasonable and necessary.

11. The said notes were legal obligations of Miller Paint Co., Inc., and enforceable by appropriate legal action.

12. The notes received by the deceased taxpayer were included in his federal estate tax return as notes receivable.

Wherefore, the petitioner prays that this Court may hear the proceeding and:

(1) Determine that the Commissioner erred in increasing dividend income in the amount of $5,105.74.

(2) Determine that the Commissioner erred in decreasing capital gains in the amount of $3,984.17.

(3) Grant such other and further relief as the Court may deem proper.

/s/ CHESTER E. McCARTY,
Attorney for Petitioner.

Form 1230

Treasury Department
Internal Revenue Service

Securities Building
Seattle 1, Washington
February 28, 1950

Office of
Internal Revenue Agent in Charge
Seattle Division
IT:90D:HWF

Estate of Herbert B. Miller, Deceased,

United States National Bank of Portland (Oregon),
Former Executor, Portland, Oregon.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946, discloses a deficiency of $1,882.27 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 24, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Seattle 1, Washington, for the attention of IT:90D:HWF. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, which ever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,

By S. R. STOCKTON,
Internal Revenue Agent
in Charge.

Enclosures:
Statement
Form 1276
Form of waiver
HWF:mtr

IT:90D:HWF

Statement

Estate of Herbert B. Miller, Deceased
United States National Bank of Portland, (Oregon)
Former Executor
Portland, Oregon

Tax Liability for the Taxable Year Ended December 31, 1946

	Deficiency
Income Tax	$ 1,882.27

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated June 30, 1949, and to your protest dated September 16, 1949.

Adjustments to Net Income

Net income as disclosed by return			$39,170.25
Unallowable deductions and additional income:			
(a)	Dividends increased	$ 5,105.74	
(b)	Partnership income increased	1,231.18	
(c)	Taxes reduced	23.37	6,360.29
			$45,530.54
Nontaxable income and additional deductions:			
(d)	Capital gain reduced		3,984.17
Net income adjusted			$41,546.37

Explanation of Adjustments

(a) It has been determined that the $7,500.00 which the decedent received from Miller Paint Co., Inc., and excluded from gross income included a taxable distribution in the amount of $5,105.74. Net income is increased accordingly.

(b) It has been determined that the decedent's distributable portion of the ordinary net income of Miller Paint Co., a partnership, was $20,018.02, an increase of $1,231.18 over the amount of such income reported.

(c) The telephone tax in the amount of $23.37 claimed on the return is not an allowable deduction within the purview of Section 23(c) of the Internal Revenue Code.

(d) It has been determined that no gain or loss should be recognized upon the transfer of the net assets of the partnership, Miller Paint Co., to the corporation, Miller Paint Co., Inc. Therefore, the long-term capital gain reported by the decedent on the transfer of his proportionate share of such assets is eliminated from income.

Computation of Tax

Net income amended	$41,546.37
Less: Exemptions	1,500.00
Normal tax and surtax net income	$40,046.37
Tentative normal tax and surtax	$19,772.00
Less: 5% of tentative tax	988.60
Income tax liability	$18,783.40
Previous assessment Account No. 3013011	16,901.13
Deficiency in income tax	$ 1,882.27

Duly verified.

Lodged December 5, 1950.

Filed December 5, 1950, T.C.U.S.

[Title of Tax Court and Cause.]

ANSWER TO SECOND AMENDED PETITION

Comes Now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the second amended petition herein, admits and denies as follows:

1. Admits the allegations contained in paragraph I of the second amended petition.

2. Admits the allegations contained in paragraph II of the second amended petition.

3. Admits the allegations contained in paragraph III of the second amended petition.

4. Denies that he erred in his determination of deficiency in income tax as shown by the notice of deficiency from which petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV(1) and (2) of the second amended petition.

5(a). Admits that Miller Paint Co., Inc., was duly organized and incorporated under the laws of the State of Oregon. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph V(1) of the second amended petition.

(b) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(2)(a), (b), (c) and (d) of the second amended petition.

(c) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(3), (4) and (5) of the second amended petition.

(d) Admits that the deceased taxpayer reported certain income as a long-term capital gain. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph V(6) of the second amended petition.

(e) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(7) of the second amended petition.

(f) Denies the allegations contained in paragraph V(8) of the second amended petition.

(g) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V(9), (10), (11) and (12) of the second amended petition.

6. Denies generally and specifically each and every material allegation contained in the second amended petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied and that the Commissioner's determination of deficiency be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue

Of Counsel:

WILFORD H. PAYNE,
Division Counsel;

JOHN H. PIGG,
Special Attorney,
Bureau of Internal Revenue

Received and filed December 28, 1950, T.C.U.S.

[Title of Tax Court and Cause.]

Docket Nos. 28582 and 31063

STIPULATION OF FACTS

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above entitled taxpayer, by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the ground of immateriality or irrelevancy.

1. Herbert B. Miller died testate on February 13, 1948. The United States National Bank of Portland (Oregon), was appointed Executor of the estate of said decedent on February 17, 1948. On or about May 21, 1949, The United States National Bank of Portland (Oregon), filed with the Commissioner of Internal Revenue formal notice of its fiduciary capacity for petitioner-taxpayer pursuant

to the Internal Revenue Code, Section 312(a). On or about July 14, 1949, the administration of the estate was completed and The United States National Bank of Portland (Oregon), was discharged as Executor. The United States National Bank of Portland (Oregon), did not give the Commissioner of Internal Revenue formal notice of the termination of its fiduciary capacity pursuant to Section 312(b), of the Internal Revenue Code. At all times and dates herein mentioned The United States National Bank of Portland (Oregon), was and now is the duly appointed, qualified and acting Executor of said estate, and has been and is now acting in a fiduciary capacity with respect to said estate, assuming all of the powers, rights, duties and privileges of said petitioner-taxpayer with respect to the taxes imposed by the Internal Revenue Code, or within the meaning of Section 312 of the Internal Revenue Code. On or about July 14, 1949, the entire residuary estate subject to minor specific bequests, was distributed under the terms of the Last Will and Testament of said decedent to The United States National Bank of Portland (Oregon) as trustee under the Last Will and Testament of said decedent. Petitioner is still acting as such trustee and is in possession of the residuary assets of decedent's estate. On October 9, 1950, the Circuit Court of the State of Oregon for the County of Multnomah, Department of Probate, reopened said estate and the petitioner was duly appointed administrator de bonis non with will annexed of decedent's estate. The return of the calendar year 1946 was filed with

the Collector of Internal Revenue at Portland, Oregon.

2. The notices of deficiency from which the respective appeals herein are taken, copies of which are attached to the respective petitions and each marked Exhibit "A" were mailed to petitioner on February 28, 1950, and August 7, 1950. The taxes in controversy are income taxes of Herbert B. Miller for the taxable years 1946 and 1947 in the respective amounts of $1,882.27 and $3,982.35.

3. Prior to June 1, 1946, the decedent, Herbert B. Miller, and his brothers, Walter M. Miller and Ernest Miller, Jr., were associated together in a partnership doing business under the assumed name of Miller Paint Co. in Portland, Oregon. The assets of this partnership consisted only of cash and items of personal property. Certain real estate used by the partnership was rented from Miller Paint and Wallpaper Co., a co-partnership composed of the same three individuals.

4. The following described photostatic copies of tax returns may be offered and received in evidence in lieu of the originals, and may be identified as follows:

Exhibit	Return
1-A	Partnership Return, form 1065, Miller Paint Co., Portland, Oregon, January 1, 1946, to May 31, 1946.

2-B—1946 Individual income tax return, form 1040, Herbert B. Miller.

3-C—1947 Individual Income Tax Return, form 1040, Herbert B. Miller.

4-D—Corporation Income Tax Return, form 1120, taxable period ended November 30, 1946, Miller Paint Co., Inc., Portland, Oregon.

5-E—Corporation Income Tax Return, form 1120, taxable period ended November 30, 1947, Miller Paint Co., Inc., Portland, Oregon.

6-F—Federal Estate Tax Return, form 706, Estate of Herbert B. Miller, Deceased, certain excerpted schedules only.

5. A photostatic copy of a protective claim for refund of estate taxes filed by the Estate of Herbert B. Miller, deceased, may be admitted in evidence solely for the purpose of advising the Court with respect to the adjustments made by respondent and objected to by petitioner, and the same, or the facts stated therein shall not be regarded as proof of any fact alleged in the claim or an admission on the part of the petitioner. This document may be identified as Exhibit 7-G.

6. Photostatic copies of the statutory notice of deficiency and thirty-day notice of a proposed deficiency issued by respondent with respect to the income tax liability of Miller Paint Co., Inc., may be admitted in evidence solely for the purpose of advising the Court as to the respondent's adjustments to the income and available earnings and profits of the corporation made by the respondent for the tax-

able periods ended November 30, 1946, and November 30, 1947, respectively. These documents may be admitted and identified as Exhibits H and I.

7. A photostatic copy of the report of examination of the income of Miller Paint Co., a co-partnership, may be admitted in evidence as 8-J solely for the purpose of advising the Court with respect to an adjustment to income of petitioner for the taxable year 1946.

8. The above named partners, Herbert B. Miller, Walter M. Miller and Ernest Miller, Jr., on or about May 13, 1946, formed an Oregon Corporation known as Miller Paint Co., Inc., sometimes referred to herein as the corporation. The authorized capital stock of 300 shares no par value was subscribed for at the basis of $3.50 per share and in equal portions by the three partners. The amounts subscribed were paid for in cash from their personal bank accounts, on or about August 2, 1946, as shown in Exhibit 9-K, a photostatic copy of a composite Exhibit consisting of a check of Walter Miller, a Miller Paint Co., Inc., bank statement and a Miller Paint Co., Inc., duplicate deposit slip.

9. The corporation received its charter on May 18, 1946. The stock was issued on May 20, 1946, and the corporation was ready to begin business on June 1, 1946.

10. The corporation acquired a large portion of the assets of the partnership. It succeeded to the business of the Miller Paint Co. partnership. All the

tangible assets, including inventory, equipment and fixtures of the partnership were acquired by the corporation. The agreed fair market value of the various physical assets acquired on June 1, 1946, was as follows:

	Fair Market Value June 1, 1946
Inventory	$60,122.49
Machinery and Equipment	15,000.00
Furniture and Fixtures	3,000.00
Delivery Equipment	7,500.00
Office Equipment	1,000.00
Total	$86,622.49

The adjusted basis of the same assets in the partnership as of May 31, 1946, was lower.

11. The Corporation also acquired from the partnership their accounts receivable, petty cash and change fund, and some unearned insurance premiums and assumed certain trade accounts payable of the partnership, as follows:

Petty Cash and Change Fund	$ 598.00
Accounts Receivable	89,328.54
Unexpired Insurance	636.40
Total	$90,562.94
Less: Accounts Payable	52,614.17
Balance	$37,948.77

12. Decedent, Herbert B. Miller, received the amounts of $7,500 and $10,000 from Miller Paint

Co., Inc., during the respective taxable period ended November 30, 1946, and November 30, 1947. Equal amounts were paid to Walter M. Miller and Ernest Miller, Jr. The item of "Notes Payable" on the Balance Sheet of the corporation of $174,571.26 was reduced in amounts the equivalent of the foregoing payments to the respective shareholders.

13. Respondent contrary to petitioner's contentions determined that there were available for distribution earnings and profits of Miller Paint Co., Inc., in the amounts of $15,317.23 and $29,062.09 during the respective taxable periods ended November 30, 1946, and November 30, 1947, and that the above described payments of $7,500 and $10,000 to each of the shareholders as aforesaid represented distributions to that extent. The following computation shows the method respondent used in arriving at these amounts:

	Taxable Period Ended	
	Nov. 30, 1946	Nov. 30, 1947
Net income per return	$22,024.24	$48,448.19
Adjustments to income, per statutory notice	3,881.29	15,571.40
Corrected net income	$25,905.53	$64,019.59
Income tax liability	6,224.02	24,203.94
Available for distribution	$19,681.51	$39,815.65
Disallowed interest deduction	(4,364.28)	(7,603.56)
Excessive Salary		(3,150.00)
Remainder treated as taxable dividends by respondent	$15,317.23	$29,062.09

14. Joint Exhibit 10-L, a photostatic copy of the earning and asset schedule of Miller Paint Co., a co-partnership, and Miller Paint Co., Inc., may be admitted to show the data behind the appraisement of the Miller Paint Co., Inc., stock owned by Herbert B. Miller as of the date of death. The following computation shows the method the Executor used in arriving at the appraised value of the stock:

$$\frac{\text{Average Net Income X 5}}{\text{300 Shares}} = \text{Fair Market Value of 1 Share}$$

$$\$20{,}866.76 \text{ X } 5 = \$347.78$$

15. The following described photostatic copies of documents may be offered and received in evidence in lieu of the originals and may be identified as follows:

Exhibit	Document
11	Composite document of letter of the U.S. National Bank directed to Miller Paint Co., Inc., dated January 10, 1951 with enclosure.
12	Death certificate of Herbert B. Miller.
13	Chattel mortgage Miller Paint Co., Inc., to Ernest Miller, Jr., Herbert B. Miller, and Walter B. Miller dated June 3, 1946.
14	Certified copy of Inventory and Appraisement filed in the estate of Herbert B. Miller, deceased, in the Circuit Court of the State of Oregon for the County of Multnomah, Department of Probate, proceeding No. 59444.

15—Certified copy of Last Will and Testament of Herbert B. Miller.

16. A duplicate original of letter from Pattullo and Wilson to Chester E. McCarty dated June 23, 1946, may be admitted in evidence for the purpose of advising the Court of the instructions to the corporation through their attorney relative to the entries and the beginning balance sheet of the corporation.

17. Photostatic copies in lieu of the originals may be introduced of the following documents subject to further identification by petitioner's witnesses.

Exhibit	Document
17	Composite exhibit of notes payable by Miller Paint Co., Inc., to Ernest Miller, Jr., Herbert B. Miller, and Walter M. Miller.
18	Note payable by Miller Paint Co., Inc., to Herbert B. Miller dated June 1, 1946, in sum of $28,874.16.
19	Note payable by Miller Paint Co., Inc., to Herbert B. Miller dated June 1, 1946, in sum of $29,316.26.
20	Thirty day letter directed to Mrs. Blanche M. Miller for year 1949.
21	Ninety day letter directed to Mrs. Blanche M. Miller for year 1949.
22	Thirty day letter directed to testamentary trust of Herbert B. Miller for year 1949.
23	Ninety day letter directed to testamentary trust of Herbert B. Miller for year 1949.

24—Photostatic copy of interoffice communication of U.S. National Bank re Miller Paint Co., partnership.

25—Extract of minutes of Miller Paint Co., Inc.

18. Respondent reserves the right to cross-examine any of petitioner's witnesses with respect to any facts or documents herein stipulated.

/s/ DANIEL A. TAYLOR, JHP
Chief Counsel Internal Revenue Service, Counsel for Respondent.

/s/ GEORGE W. MILLER,
Of Counsel for Petitioner.

Filed at hearing October 11, 1954.

The Tax Court of the United States

Docket Nos. 28582, 31063

FINDINGS OF FACT AND OPINION

Three equal partners determined to operate their business in corporate form. Pursuant to a prearranged plan they paid a nominal amount for all the stock, which was no par and of a nominal declared value, of a newly organized corporation, and thereafter transferred to it substantially all the operating assets of the partnership plus $50,000 in cash. The corporation issued notes purportedly in exchange for such assets and cash. Held, the sum representing the declared value of the stock was grossly inadequate to operate the business and the low stated value was a fiction; the risk capital ac-

tually contributed to the corporation was represented by the operating assets and cash; no bona fide indebtedness was created by the notes; and the true consideration for the cash and operating assets was the stock alone. Payments which the corporation subsequently made purportedly with respect to the notes constituted in fact distributions of taxable dividends to the extent of available earnings and profits, Section 115(a), I.R.C. 1939.

Held further, the above transactions constituted a transfer within Section 112(b)(5), I.R.C. 1939. No gain was recognized to the transferors, and the basis to the transferee corporation of the assets received by it is the same as that in the hands of the transferors immediately prior to the exchange, Section 113(a)(8), I.R.C. 1939.

GEORGE W. MILLER, ESQ., and
DAVID S. PATTULLO, ESQ.,
For the Petitioner.

JOHN H. WELCH, ESQ.,
For the Respondent.

The respondent determined deficiencies in the income tax of Herbert B. Miller for 1946 and 1947 in the amounts of $1,882.27 and $3,982.35, respectively. The issues are, first, whether certain corporate distributions constituted taxable dividends, and, second, whether the purported sale of various assets to a corporation together with a contribution of cash constituted in reality a transfer governed by the non-recognition provisions of Section 112(b)(5) and the basis provisions of Section 113(a)(8) of the Internal Revenue Code of 1939.

Findings of Fact

Some of the facts have been stipulated by the parties. Such facts are incorporated herein by this reference as part of our findings.

Herbert B. Miller (hereinafter sometimes called "decedent") died on February 13, 1948, a resident of Milwaukie, Orgeon. His individual income tax returns for the calendar years 1946 and 1947 were filed on the cash basis with the collector of internal revenue for the district of Oregon at Portland, Oregon.

The United States National Bank of Portland (hereinafter called "petitioner") was duly appointed as executor of decedent's will. Pursuant to the will, the decedent's entire residuary estate, after minor specific bequests, was distributed to petitioner as trustee. Petitioner is still trustee and in possession of the estate. On October 9, 1950, the Circuit Court of the State of Oregon for the County of Multnomah reopened the estate, and petitioner was duly appointed administrator de bonis non, cum testamento annexo. At the time of the trial of this case petitioner was still acting in its capacity as such administrator.

Prior to June 1, 1946, decedent and his two brothers, Ernest Miller, Jr., (hereinafter sometimes called "Ernest") and Walter M. Miller (hereinafter sometimes called "Walter"), were equal partners in the paint manufacturing and marketing business in Portland, Oregon, doing business as Miller Paint

Co. (hereinafter sometimes called the "firm"). The assets of the firm consisted of personal property, accounts receivable and cash. The real estate occupied by the firm was rented from Miller Paint and Wallpaper Co., another copartnership composed of the same three persons.

Blanche M. Miller is the widow of the decedent. Sometime in 1943 or 1944 she was informed by a physician that her husband had cancer, and could live only a few years longer. Ernest and Walter were informed of this, but none of them told the decedent, and it is not apparent whether he ever became aware of his condition.

Ernest and Walter became concerned over the problem of continuity of the business in case of the death or incapacity of a partner. Without revealing anything to the decedent relative to his physical condition, they convinced him that some steps should be taken to insure such continuity.

Decedent was the only partner with children. Ernest was married but had no children, while Walter was unmarried. The three brothers desired an arrangement whereby death or incapacity of a partner would not affect the continuity of the business, the business could carry on free of interference in case of possible complications in the eventual probate of an estate, and an estate could be created for the benefit of a decedent's family in case of his death. In addition, Ernest wished to leave his share of the business to some employees without disturbing management and control.

In late 1945 the partners conferred with trust officers of the petitioner as to the best method to accomplish the ends sought, and were advised that a trust could be created. Independent counsel, however, was also consulted, and advised that the corporate form would best serve their purposes. They decided to form a corporation and transfer to it assets necessary to carry on the business, but to take the cash of the firm into their hands individually. In the years immediately prior to June 1, 1946, earnings had been high, and no evidence was presented suggesting any doubts at that time that the prosperous condition of the business would continue.

In accordance with the plan to incorporate the business, Miller Paint Co., Inc. (hereinafter called the "corporation") was organized pursuant to the laws of the State of Oregon on or about May 13, 1946. The charter was received on May 18, 1946. Total authorized capital consisted of 300 shares of no par stock. Each partner subscribed for 100 shares of no par stock. Each partner subscribed for 100 shares at a stated value of $3.50 per share. The shares were issued on May 20, 1946. Oregon law requires that a corporation with no par stock have a capital investment of at least $1,000. Each partner paid the stated value of the stock subscribed for by him in cash from his respective personal bank account.

The first meeting of the board of directors was held on May 20, 1946. It was resolved that the cor-

poration borrow $50,000 from the three partners and execute a three-year promissory note therefor bearing interest at five per cent per annum. This resolution was carried out on June 1, 1946. At another meeting, held on June 3, 1946, it was resolved that the corporation purchase from the partners at inventory value substantially all the operating assets of the firm. The fair market value of such assets was $86,622.49, and a note in such amount was issued, payable in annual installments of no less than $20,000, and bearing interest at five per cent per annum.

Another resolution called for the purchase by the corporation of certain intangible assets of the firm, subject to liabilities. The net fair market value thereof was $37,948.77, and a note in that amount was given to the partners. The note bore interest at five per cent per annum and was payable six years from date.

Each of the foregoing notes was issued to the partners in their joint names. The partners at all times considered their interests in the assets and in the notes received therefor to be equal.

The corporation executed and delivered a chattel mortgage encumbering its personal property as security for the notes in the amounts of $86,622.49 and $37,948.77, which had been issued in exchange for the tangible and intangible assets, respectively, of the firm.

As a result of the foregoing, the corporation acquired a substantial amount of cash and the business assets of the firm, and succeeded to the latter's business. The tangible assets so acquired were as follows:

Item	Fair Market Value on June 1, 1946
Inventory	$60,122.49
Machinery and Equipment	15,000.00
Furniture and Fixtures	3,000.00
Delivery Equipment	7,500.00
Office Equipment	1,000.00
Total	$86,622.49

The adjusted basis of the firm in the above assets on June 1, 1946, was less than the fair market value thereof. The firm reported a gain in the amount of $6,683.68, which was proportionally reflected and reported as a long-term capital gain on the individual income tax returns of the partners.

Other assets of a net fair market value of $37,948.77 acquired by the corporation were as follows:

Item	Amount
Petty cash and change fund	$ 598.00
Accounts Receivable	89,328.54
Unexpired Insurance	636.40
Total	$90,562.94
Less: Accounts Payable	52.614.17
Balance	$37,948.77

At a meeting of the board of directors on July 31, 1946, it was resolved that the foregoing three notes be cancelled, and that in lieu thereof new notes be issued separately to each partner in the amount of his one-third interest.

Pursuant to the above resolution, the notes for $50,000 and $37,948.77 were cancelled, and a note in the face amount of $29,316.26 was issued to each partner. At the same time the note for $86,622.49 was cancelled and each partner received a note for $28,874.16. Of the new notes issued, the latter were payable in annual installments of no less than $6,-666.66, while the former were payable six years from date. All bore interest at five per cent per annum. By resolution of the board of directors, the previously executed chattel mortgages were made to stand as security for the payment of the new notes. The books of the corporation have at all times carried the amounts of these notes as a "Notes Payable" liability.

In 1946 and 1947 decedent received amounts designated as payments upon the principal of the note held by him in the face amount of $28,874.16. These payments amounted to $7,500 in 1946 and $10,000 in 1947. Equal amounts were paid to Ernest and Walter on their respective notes, and a corresponding reduction in the "Notes Payable" account was taken on the books of the corporation. No dividend has ever been formally declared by the corporation despite substantial earnings.

The principal purpose in forming the corporation was to transfer to it the business conducted up to that time by the firm together with a substantial amount of cash. No material change in the investment of the partners was contemplated, except that they would now be carrying on the same business in corporate form.

The initial creation of the corporation with stock of a declared value of $1,050 was viewed by the partners as merely the first step in a single plan, the over-all objective whereof was to transfer the paint business to the corporation so that they could continue to operate the business in a new form. The several transfers set forth above, though occurring on different days, were in fact parts of a single integrated transaction.

The cash and all other assets transferred to the corporation in May and June of 1946, were intended by the partners as a permanent investment. There was no bona fide intention to effect a sale or dispose of the business in any other manner. The total cash and total value of assets transferred to the corporation is the true measure of the capital investment of the partners in the corporation, and was the actual consideration paid for the stock in substance, though not in form. The notes did not create a bona fide debtor-creditor relationship. No business reason dictated the formal method of capitalization undertaken. The payments at issue were received by decedent as a stockholder, not as a

creditor, and constituted taxable dividends to the extent of available earnings and profits.

The foregoing transaction was in substance a transfer of property solely in exchange for stock of the transferee corporation, and is governed by the provisions of Section 112(b)(5) of the Internal Revenue Code of 1939. No gain was recognizable to the transferors and the basis to the corporation is the same as that in the hands of the tranferors prior to the exchange, pursuant to Section 113(a)(8) of the Internal Revenue Code of 1939.

Opinion

Raum, Judge:

While two issues have been separately stated, they are actually different aspects of the same question. Both depend upon the reality of the purported indebtedness evidenced by the notes.

It should be noted at the outset that this is not a case involving "hybrid securities," a term generally used to describe corporate instruments bearing indicia both of evidence of indebtedness and of capital investment, where the problem is one of determining whether the terms of the instrument as read create an effect more like that of an investment or more like that of a debt. See, e.g., Universal Oil Products Co. v. Campbell, 181 F. 2d 451, 476-477 (C.A. 7), certiorari denied, 340 U.S. 850; Commissioner v. J. N. Bray Co., 126 F. 2d 612 (C.A. 5); Commissioner v. Palmer, Stacey-Merrill, Inc., 111 F. 2d 809 (C.A. 9); Commissioner v. Proctor Shop,

82 F. 2d 792 (C.A. 9); Mullin Building Corporation, 9 T.C. 350, affirmed per curiam, 167 F. 2d 1001 (C.A. 3); Charles L. Huisking & Co., Inc., 4 T.C. 595.

The form of the notes in the instant case presents no such problem. These notes, standing by themselves, are clear evidences of indebtedness. As we understand respondent's position, it is that there was no genuine indebtedness underlying the notes, that the consideration purportedly given for the notes was in fact the true risk capital of the corporation and must be treated as reflected in the stock rather than the notes which must be disregarded. In short, it is another way of saying that substance must prevail over form, and the substance of the transaction at issue was that of a capital investment for stock and not a sale for notes. Our analysis of the facts forces us to agree with the conclusions of the respondent.

The form of a transaction has some evidentiary value, but it is not conclusive. Gregory v. Helvering, 293 U.S. 465. The same is true of bookkeeping entries. Doyle v. Mitchell Brothers Co., 247 U.S. 179. The crucial factor here is not the formal characterization of these notes, but, rather, the proper characterization of the underlying transaction and the relationship in fact created thereby. Cf. Gooding Amusement Co., 23 T.C. 408, on appeal (C.A. 6); Kraft Foods Co., 21 T.C. 513, on appeal (C.A. 2); 1432 Broadway Corporation, 4 T.C. 1158,

affirmed per curiam, 160 F. 2d 885 (C.A. 2). In Kraft Foods Co., supra, we said (21 T.C. at p. 594):

> * * * we do not have here a case in which the instruments involved had some of the characteristics of both debentures and certificates of stock * * *. In the instant case, all of the requirements of form and ritual necessary to make the instruments debentures were meticulously met. They were either evidences of indebtedness and effective as such, or, being purely ritualistic and without substance, were futile and ineffective to make the annual payments interest.

The intention of the parties is controlling, and such intention is a fact to be gleaned from the entire record. Cf. Tribune Publishing Company, 17 T.C. 1228; Ruspyn Corporation, 18 T.C. 769; Isidor Dobkin, 15 T. C. 31, affirmed per curiam, 192 F. 2d 392 (C.A. 2); Lansing Community Hotel Corporation, 14 T. C. 183, affirmed per curiam, 187 F. 2d 487 (C.A. 6); Sam Schnitzer, 13 T.C. 43, affirmed per curiam, 183 F. 2d 70 (C.A. 9), certiorari denied, 340 U.S. 911; Cleveland Adolph Mayer Realty Corporation, 6 T.C. 730, reversed on another issue, 160 F. 2d 1012 (C.A. 6); Joseph B. Thomas, 2 T.C. 193.

In United States v. Title Guarantee & Trust Co., 133 F. 2d 990 (C.A. 6), where it was held that under the facts of that case the intention of the parties was to create a true debtor-creditor relationship, the Court said at p. 993:

The essential difference between a stockholder and a creditor is that the stockholder's intention is to embark upon the corporate adventure, taking the risks of loss attendant upon it, so that he may enjoy the chances of profit. The creditor, on the other hand, does not intend to take such risks so far as they may be avoided, but merely to lend his capital to others who do intend to take them. * * * (Italics in original.)

Applying the foregoing criteria to the facts before us, we must conclude that we have here no bona fide intention to effect a true debtor-creditor relationship. The partners at all times intended to be investors in the corporate business, as they had been in the firm business, to the full extent of all value contributed by them. The cash and other property transferred to the corporation was deemed by them and was in fact necessary for the successful operation of that business. Cf. Hilbert H. Bair, 16 T.C. 90, affirmed, 199 F. 2d 589 (C.A. 2). The contributions which petitioner contends created an indebtedness constituted substantially everything the corporation owned[1] and which it

[1]In form, the $50,000 cash appeared to come from the partners personally. However, the evidence discloses that the partnership had a substantial amount of cash and that such cash was taken out by the partners prior to the transfer of partnership assets to the corporation. It seems quite clear that the $50,000 cash represented in substance that portion of the partnership cash that the partners regarded as necessary to operate the business.

required in order to commence doing business and to remain in business. It was at all times intended that the value of such contributions should remain indefinitely at the risk of the going business as part of its permanent capital structure. To be sure, the partners undoubtedly expected, as contended by petitioner, earnings to be sufficiently high that in a relatively short time they would be able to withdraw sums approximating in amount their original capital investment without impairing necessary capital; and subsequent events seem to prove this expectation to have been justified. This, however, does not alter the fact that everything transferred to the corporation in May and June of 1946 was intended to remain therein as part of its permanent capital structure; only surplus earnings, to be subsequently acquired as a result of successful operations of the business were in fact intended to be withdrawn. Cf. Gregg Co. of Deleware, 23 T.C. 170, on appeal (C.A. 2). Indeed, petitioner's contention proves too much. It demonstrates plainly to us that the partners intended to use the notes as a device to siphon subsequent earnings from the enterprise while leaving the basic business assets with the corporation. Purported payments upon the notes in such circumstances would be in substance nothing more than the distribution of dividends to the stockholders, who held the notes in the same proportion as their stockholdings.

Although the notes in form are absolute, and call for fixed payments, we have no doubt, from a read-

ing of the entire record, that no payment was ever intended or would ever be made or demanded which would in any way weaken or undermine the business. As we said in Gooding Amusement Co., supra, 23 T.C. at p. 418:

> There is nothing reprehensible in casting one's transactions in such a fashion as to produce the least tax * * *. On the other hand, tax avoidance will not be permitted if the transaction or relationship on which such avoidance depends is a "sham" or lacks genuineness. The concept that substance shall prevail over form has likewise been enunciated in numerous cases. * * *
>
> In the instant case, in the matter of form, the notes in question present no problem of interpretation. The formal criteria of indebtedness are unquestionably satisfied. The notes on their face are unconditional promises to pay at a fixed maturity date a sum certain and the payment of interest thereon is not left to anyone's discretion. The instruments in form are pure evidences of indebtedness.
>
> But we are not limited in our inquiry to the instruments themselves. We may look at all the surrounding circumstances to determine whether the real intention of the parties is consistent with the purport of the instrument. * * *
>
> The most significant aspect of the instant case, in our view, is the complete identity of

> interest between and among the three note holders, coupled with their control of the corporation * * *. It is * * * unreasonable to ascribe to the husband petitioner * * * an intention at the time of the issuance of the notes ever to enforce payment of his notes, especially if to do so would either impair the credit rating of the corporation, cause it to borrow from other sources the funds necessary to meet the payments, or bring about its dissolution * * *

In Mullin Building Corporation, supra, we said (9 T.C. at p. 355):

> If the debenture stockholders are entitled to enforce payment * * * upon default * * * and should do so, petitioner's only income-producing asset * * * would either have to be liquidated or encumbered * * * If the [asset] should be liquidated, the flow of * * * income therefrom would cease; or, if the [asset] should be mortgaged * * * petitioner would pay out a large part of its earnings in interest and for retirement of principal to its mortgage creditor * * *. Such a course would be too irrational * * * to merit * * * contemplation * * *. Such a course is not within the realm of sane business practice and we are convinced that it was not intended.

Similarly, in the case at bar, in the light of all the surrounding facts and circumstances, it is not reasonable to accept the absoluteness in form of

the notes at face value. To do so would be to impute a willingness on the part of the partners to endanger their chief source of livelihood.

And see 1432 Broadway Corporation, supra, where we said (4 T.C. at p. 1164):

> * * * The debentures are in approved legal form, and, if their legal attributes alone were determinative of the character of the interest accruals, there would be little room for doubt that they were the indebtedness they purport to be. [Citing.] But, for tax purposes, their conformity to legal forms is not conclusive. Although a taxpayer has the right to cast his transactions in such form as he chooses, * * * the Government is not required to acquiesce in the taxpayer's election of form as necessarily indicating the character of the transaction upon which his tax is to be determined. * * * The Government is not bound to recognize as the substance or character of a transaction a technically elegant arrangement which a lawyer's ingenuity has devised. * * *

The record before us satisfies us that the partners were in fact investing, and not selling their business for notes. Formal capital was nominal in amount, and grossly inadequate in view of the normal needs of the business operations anticipated. The partners had been in the same business for many years, and we are satisfied that they were well aware of this inadequacy.

We do not have to decide here whether inadequate capitalization standing alone justifies the treatment of amounts alleged to represent indebtedness as invested capital. Cf. Erard A. Matthiessen, 16 T.C. 781, affirmed, 194 F. 2d 659 (C.A. 2). At any rate, it at least invites close scrutiny. Alfred R. Bachrach, 18 T.C. 479, affirmed per curiam, 205 F. 2d 151 (C.A. 2). Here the purported indebtedness arose as a result of pro rata advances by all the shareholders; it was created at the time of incorporation when the need for substantial additional permanently invested capital was apparent to the stockholders; all of the stock of the corporation was closely held by three brothers who had also been partners in the business which was being incorporated; and we can find no business purpose other than hoped-for avoidance of taxes necessitating a predominant debt structure and capital stock of a nominal declared value. Isidor Dobkin, supra; Swoby Corporation, 9 T.C. 887; Edward A. Janeway, 2 T.C. 197, affirmed, 147 F. 2d 602 (C.A. 2). Cf. Ruspyn Corporation, supra; Clyde Bacon, Inc., 4 T.C. 1107.

In the Dobkin case, supra, we said (15 T.C. at p. 32):

> Ordinarily contributions by stockholders to their corporations are regarded as capital contributions that increase the cost basis of their stock, * * * Especially is this true when the capital stock of the corporation is issued for a minimum or nominal amount and the con-

tributions which the stockholders designate as loans are in direct proportion to their shareholdings. Edward G. Janeway, supra.

When the organizers of a new enterprise arbitrarily designate as loans the major portion of the funds they lay out in order to get the business established and under way, a strong inference arises that the entire amount paid in is a contribution to the corporation's capital and is placed at risk in the business * * *

The State of Oregon requires that corporations with no par stock have at least $1,000 formally designated as invested capital. Ore. Comp. Laws, Sec. 77-228. Petitioner admits on brief that one of the purposes of the partners was to "limit the capital of the company to a bare minimum allowed by the corporation laws of the State of Oregon." While we would have so concluded independently, the above admission makes it even more apparent that the amount of $1,050 formally designated as invested capital was totally unrelated to any estimate of the actual need for capital investment, and was selected as the lowest round figure conveniently divisible into three equal parts which would satisfy State law. That amount bore no relation to the amount the partners knew would have to be permanently tied up in the business, and is not a bona fide measure of their capital investment. As we said in Sam Schnitzer, supra, 13 T.C. at p. 62:

* * * The testimony of petitioner's witnesses, * * * that the shareholders never intended

to invest more than $187,800 in stock is intelligible only as showing an agreement about mere form.

Petitioner has attempted to convince the Court that the denominated capitalization was not in fact inadequate by emphasizing the prior history of high earnings and the promising future that faced the business in 1946. The answer to this argument is also found in Sam Schnitzer, supra, where we said at p. 61:

> Petitioners argue that large operation profits were reasonably anticipated * * *. In support they stress the mill's substantial earnings in recent years and the unexpected difficulties which they encountered in erecting it. This argument lacks persuasive force. Even if the corporation had paid off the balance in its open account with [the partnership] from earnings, such payment would still have partaken of the character of dividend distributions on risked capital invested in the plant. A corporation's financial structure in which a wholly inadequate part of the investment is attributed to stock while the bulk is represented by bonds or other evidence of indebtedness to stockholders is lacking in the substance necessary for recognition for tax purposes, and must be interpreted in accordance with realities * * *.

We do not deem it a distinguishing feature that in the Schnitzer case the expectation of high earn-

ings was initially disappointed whereas in the case at bar it was fully satisfied. The language of that case indicates that such fact would have made no difference, and we agree that it should not.

Petitioner has cited John Kelley Co. v. Commissioner, 326 U.S. 521. That case, however, is of no aid to petitioner, for the very important factor of inadequate capitalization was found to be absent there. The Court did allude to just the situation we have here, however, in language which can be of no comfort to petitioner, saying at p. 526:

> As material amounts of capital were invested in stock, we need not consider the effect of extreme situations such as nominal stock investments and an obviously excessive debt structure.

See also Ruspyn Corporation, supra, 18 T. C. at p. 777; Swoby Corporation, supra, 9 T.C. at 893; Erard A. Matthiessen, supra, 16 T. C. at 785; Edward W. Janeway, supra, 2 T. C. at 202, R. E. Nelson, 19 T. C. 575, 579. Sheldon Tauber, 24 T. C. —(No. 24), is distinguishable, in that the Court there was of the opinion that the facts showed no undercapitalization.

The record in the instant proceeding satisfies us that there was no valid business purpose which dictated the gross undercapitalization here present. There seems to be no question that sound reasons existed for forming a corporation to carry on the business, which had been operating up to that time

as a copartnership, but every advantage sought through incorporation, except that of the avoidance of taxes, could have been accomplished with equal facility and assurance of success by the more normal method of the issuance of capital stock of a par or declared value more nearly commensurate with the total amount permanently contributed to the corporation, and with which it was expected thereafter to conduct its affairs. In Mullin Building Corporation, supra, the point was disposed of by saying (9 T.C. at p. 358):

> Petitioner claims that the purpose * * * was to satisfy James Mullin's desire to establish a steady income for his family and improve the sales company's credit position. The creation of petitioner accomplished these purposes just as fully by treating the debenture stock as an investment creating a proprietary interest as by treating it as an evidence of debt. * * * It was not necessary to create a 29 to 1 debt to capital ratio * * * to accomplish these ends. * * *

It may be quite true that the discovery of cancer in the decedent motivated the formation of the corporation so as to provide for continuity of the business in the event of death of one of the three brothers or in other circumstances. There was thus adequate business reason for incorporating the enterprise. But there was no business reason apparent on this record that called for such an absurdly low capitalization as petitioner asks us to accept at face. The argument that there was a business reason

for incorporating the enterprise is merely a smoke screen that may be calculated to hide the absence of any business reason for attempting to achieve the result in the form that was employed.

It has not escaped our attention that the notes in question are secured, and were not expressly subordinated to obligations of other creditors. Viewing, however, as we must, all the surrounding facts, this circumstance is not impressive. This, in our opinion, is again a matter of perfection of form, wherein what was in fact capital investment has been garbed in the raiment of indebtedness. In addition, we have serious doubts as to the extent to which such security would be upheld as against the claims of outside creditors, should the attempt to do so ever have to be made, as in bankruptcy. In Arnold v. Phillips, 117 F. 2d 497 (C.A. 5) certiorari denied, 313 U. S. 583, a deed of trust was made in favor of the dominant stockholder as security for advances already made and to be made in the future. The stockholder later foreclosed on his security. Subsequently, the deed of trust and foreclosure were set aside by the bankruptcy court, even in the absence of fraud, on the ground that there was an inadequacy of original capital, of which the stockholder was aware. The advances were treated as stock subscriptions, and payments thereon, designed as interest, were held to constitute dividends.

Since we have concluded that there was no indebtedness, it must follow that all payments pur-

portedly made on the notes, including those denominated as payments of principal, must in fact constitute taxable dividends within Section 115(a) of the Internal Revenue Code of 1939 to the extent of available earnings and profits. As was said in Gooding Amusement Co., supra, 23 T.C. at p. 421:

> * * * Since the notes did not, in reality, represent creditor interests, the payments made to the stockholders * * * must be considered not as payments of a bona fide indebtedness of the corporation, but as distributions of corporate profits to the stockholders as stockholders and not as creditors. Therefore, we conclude that they constituted dividends under the broad language of Section 115(a) * * * The fact that the corporation, or rather the petitioner, may have had no intention of distributing earnings under the guise of discharging debts is immaterial.

For the foregoing reasons and on the strength of the above authorities, we decide the first issue in favor of the respondent.

The second issue is the applicability of Section 112(b)(5) of the Internal Revenue Code of 1939. This issue must be resolved in favor of the respondent for reasons that have already been set forth as determinative of the first issue. We have previously concluded that there was no true debt, and that all the assets transferred to the corporation in May and June of 1946 represented invested capital. The true consideration for this transfer consisted of the

shares of capital stock of the corporation, all of which were issued to the transferors in proportion to their respective interest in the property transferred by them. The notes are a mere sham, and have no reality. The transaction, thus viewed, falls squarely within the provisions of Section 112(b)(5). "Since we have found * * * the notes * * * in fact representative of risk capital invested in the nature of stock, the 'solely in exchange for stocks or securities' requirement of Section 112(b)(5) was, in our considered judgment, satisfied." Gooding Amusement Co., supra, at p. 423.

"Property" includes money, so the fact that cash as well as business assets were contributed cannot affect this result. Halliburton v. Commissioner, 78 F. 2d 265 (C.A. 9); George M. Holstein, III, 23 T.C.....

Section 112(b)(5) is applicable, and the basis of the assets transferred to the corporation is, pursuant to Section 113(a)(8) of the Internal Revenue Code of 1939, the same as that in the hands of the transferors, no gain having been properly recognized with respect thereto on the transfer. Accordingly, the amount of earnings and profits available for distribution as a dividend, and the amount of the deficiency are as asserted by the respondent in his notice.

Decisions will be entered for the respondent.

Served August 23, 1955.

Filed August 23, 1955.

The Tax Court of the United States
Washington

Docket No. 28582

Estate of HERBERT B. MILLER, Deceased, THE UNITED STATES NATIONAL BANK OF PORTLAND (Oregon), Administrator, d.b.n., c.t.a.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed August 23, 1955, it is

Ordered and Decided: That there is a deficiency in income tax of $1,882.27 for the year 1946.

/s/ ARNOLD RAUM,
Judge.

Served August 24, 1955.

Entered August 24, 1955.

The Tax Court of the United States
Washington

Docket No. 31063

Estate of HERBERT B. MILLER, Deceased, THE UNITED STATES NATIONAL BANK OF PORTLAND (Oregon), Administrator, d.b.n., c.t.a.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed August 23, 1955, it is

Ordered and Decided: That there is a deficiency in income tax of $3,982.35 for the year 1947.

/s/ ARNOLD RAUM,
Judge.

Served August 24, 1955.

Entered August 24, 1955.

In The United States Court of Appeals
For the Ninth Circuit

Docket No. 28582

[Title of Cause.]

PETITION FOR REVIEW

The United States National Bank of Portland (Oregon), Administrator, d.b.n., c.t.a., of the Estate of Herbert B. Miller, Deceased, petitioner in this cause, by George W. Miller, counsel, hereby files its petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States rendered on August 24, 1955 (24 TC No. 103, No. 28582), determining a deficiency in deceased, Herbert B. Miller's income tax of $1,882.27 for the year 1946 and respectfully shows:

I.

The decedent, Herbert B. Miller, filed his income tax return for the year 1946 with the Collector of Internal Revenue, Portland, Oregon.

II.

Nature of Controversy

The controversy involves the proper determination of the deceased Herbert B. Miller's income tax for the year 1946.

In 1946, taxpayer and his two brothers, who were partners, determined to operate their paint manu-

facturing business in a corporate form. A corporation, Miller Paint Co., Inc., was organized with 300 shares no par stock issued and paid for in cash at the rate of $3.50 per share or a total sum of $1,050.00. Herbert B. Miller owned 100 shares. The deceased, Herbert B. Miller and his brothers sold the operating assets of the partnership to the corporation at market value, loaned $50,000.00 in cash to the corporation and received from the corporation in equal amounts promissory notes totaling $174,571.26. The sale of the assets at market value resulted in a capital gain which the deceased taxpayer reported and paid tax thereon.

In 1946, Miller Paint Co., Inc. paid to deceased taxpayer a payment upon the principal of the notes.

The Commissioner of Internal Revenue held: (1) That the payment on the principal of the notes was a dividend reportable by the taxpayer as income, and (2) that the sale of the operating assets of the corporation, including the cash loaned, constituted a transfer governed by the nonrecognition of gain or loss provision of Section 112(b)(5) and the basis provision of 113 (a)(8) of the Internal Revenue Code of 1939, which holding resulted in the deficiency aforesaid. The Tax Court of the United States sustained the Commissioner.

III.

The said petitioner, being aggrieved by the findings of fact and conclusions of law contained in the findings and opinion of the Tax Court of the United

States and by its decision entered pursuant thereto, does hereby apply for a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ GEORGE W. MILLER,

/s/ DAVID S. PATTULLO,
Counsel for Petitioner.

Duly verified.

Received November 17, 1955.

Filed November 17, 1955, T.C.U.S.

In the United States Court of Appeals
For the Ninth Circuit

Docket No. 28582

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Chief Counsel, Internal Revenue Service, Washington, D. C.

You are hereby notified that the petitioner, on the 17th day of November, 1955, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a Petition for Review of the decision of the Tax Court of the United States heretofore rendered in the above entitled cause. A copy of the Petition for Review is hereto attached and served upon you.

Dated at Portland, Oregon, this 18th day of November, 1955.

Respectfully,

/s/ GEORGE W. MILLER,
Counsel for Petitioner.

Receipt of copy acknowledged.

Filed November 21, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

Docket Nos. 28582 and 31063

STATEMENT OF POINTS

Comes now the Petitioner, above named, by its attorney, George Miller, and hereby asserts the following errors upon which it intends to urge upon review by the United States Court of Appeals for the Ninth Circuit of the decisions of the Tax Court of the United States on August 24, 1955, rendered in Docket Nos. 28582 and 31063.

1. The Tax Court erred in holding that any deficiency exists with respect to the deceased, Herbert B. Miller's personal income taxes for the taxable years ending December 31, 1946, and December 31, 1947.

2. The Tax Court erred in holding that payments made upon the principal of promissory notes held by the decedent and issued by Miller Paint Company, Inc. constituted taxable dividends within Section 115 (a) of the Internal Revenue Code of

1939 to the extent of the available earnings and profits of the corporation.

3. The Tax Court erred in holding that the sale of various assets of a predecessor partnership at market value to Miller Paint Company, Inc., together with a contemporaneous loan of cash for issuance by the corporation of notes payable to the decedent partner was a transfer of assets "solely in exchange for stock or securities" within the nonrecognition of gain or loss provisions of Section 112 (b)(5) of the Internal Revenue Code of 1939.

4. The Court erred in holding the sum representing the declared value of the capital stock of Miller Paint Company, Inc., was grossly inadequate to operate the business; the low stated value of the capital stock was a fiction; the risk capital actually contributed to the corporation was represented by the operating assets and cash; no bona fide indebtedness was created by the notes; and the true consideration for the cash and operating assets was the stock alone.

5. The Court erred in failing to find that the issuance of the notes did not create a bona fide debtor-creditor relationship between the taxpayer and Miller Paint Company, Inc. and that the payments received by taxpayer upon the principal of the notes were a return of capital.

6. The Court erred in failing to hold that the substance of the business transaction at issue was identical to its form.

7. The Tax Court erred in that its opinion and decisions are not supported by, and are contrary to the law and the evidence and the Findings of Fact and other facts established by competent and uncontradicted proof which were not found by the Tax Court.

McCARTY, SWINDELLS,
MILLER & McLAUGHLIN,
DAVID S. PATTULLO,

/s/ GEORGE W. MILLER,
Attorneys for Petitioner.

Service of copy acknowledged.

Filed December 6, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

Nos. 28582, 31063

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit is extended to February 15, 1956.

/s/ STEPHEN E. RICE,
Acting Chief Judge.

Dated: Washington, D.C. December 20, 1955.

Served December 21, 1955.

The Tax Court of the United States

Docket No. 28582

Estate of HERBERT B. MILLER,
Deceased, et al.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 31063

Estate of HERBERT B. MILLER,
Deceased, et al.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Monday, October 11, 1954

The above-entitled matter came on for hearing pursuant to notice to the parties, at 2:25 o'clock p.m.

Before: Honorable Arnold Raum, J.

Appearances:

GEORGE W. MILLER, ESQ.,
DAVID S. PATTULLO, ESQ.,
For the Petitioners.

JOHN H. WELCH, ESQ.,
For the Respondent.

The Court: Are you ready to proceed, gentlemen?

The Clerk: Docket No. 28582, estate of Herbert B. Miller, deceased, et al., and Docket No. 31063, estate of Herbert B. Miller, deceased, et al.

Kindly state your appearances for the record.

Mr. Miller: George W. Miller, attorney for the petitioner.

Mr. Welch: John H. Welch, appearing for the respondent.

Mr. Pattullo: David S. Pattullo, for the petitioner.

The Court: Proceed.

Mr. Miller: If the Court please, in the matter of Docket No. 31063, we respectfully move the Court to file a first amended petition in that case, to bring the allegations of that petition directly in line and in conformity to those in Docket No. 28582. This amendment has already been submitted to opposing counsel and I understand he does not oppose the amendment.

Mr. Welch: I was handed a copy of the first amended petition Saturday and I have not had time to prepare an amended answer, or answer to the petition as amended.

The Court: Do you object to the filing of the petition?

Mr. Welch: I do not object to the filing. I [4*] merely wish time to submit an answer to the petition.

The Court: How much time would you like?

Mr. Welch: A week.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Miller: Very well.

The Court: The amended petition will be received and the respondent may have ten days within which to file his responsive pleading.

Mr. Miller: If the Court please, we respectfully move to consolidate these two docket numbers for trial.

Mr. Welch: No objection.

The Court: They will be consolidated.

Mr. Welch: The parties have entered into a written stipulation of facts in this proceeding, which contemplates the major portion of the evidence in the case. What I wish to present is the original and two copies of a written stipulation. In the stipulation we have identified various tax returns and other documents, various letters and numbers. They are not attached to the petition or made a part of it. They are merely identified in the petition, and I would like to at this time——

The Court (Interrupting): Do you mean in the stipulation?

Mr. Welch: In the stipulation, yes, sir. And I have marked them as is shown here, with a 1-A, et cetera.

The Court: Are they identified in the stipulation?

Mr. Welch: They are identified in the stipulation, [5] in the manner in which——

The Court (Interrupting): Very well, the stipulation will be received and the accompanying exhibits will be treated as part of the stipulation. Is

that in accordance with the understanding of counsel?

Mr. Welch: With one reservation, your Honor.

Mr. Miller: That is in accordance, your Honor.

Mr. Welch: In the last paragraph of the stipulation, which is paragraph 17, we have identified certain photostatic copies of documents which petitioner expects to introduce in this proceeding. Now, it's the respondent's position that if those documents are properly proved to be part of this case, both as to materiality and competency, then we have no objection to the photostatic copies being admitted. But I have endeavored here to reserve all rights with respect to the admission of those documents.

The Court: You are admitting their authenticity and accuracy?

Mr. Welch: Yes, but not their competency or their relevancy or materiality.

The Court: The stipulation and accompanying exhibits will be received.

Mr. Miller: If the Court please, proceeding with the opening statement, if the Court is ready, that, generally, both cases have two principal issues involved. One was whether or [6] not there was a reorganization under Section 112 (b)(5) of the 1939 code from a partnership to a corporation, so that there was a tax-free reorganization, as distinguished from a taxable transfer of some type, it being the government's contention in this particular case that there was a tax-free reorganization, it being our contention that there was not. Then again, the further principal problem is the question which——

The Court (Interrupting): 112 (b)(5) deals with a tax-free exchange, not a tax-free reorganization.

Mr. Miller: I misspoke myself, your Honor.

The other principal problem stems around the outline of these thin incorporation cases, as to whether or not certain assets which came into the hands of a new corporation, whether they were taken as a result of a purchase, creating a debt situation in the hands of the previous partners. This, of course, raises the question, again the principal question that is involved in this case, does the repayment of the debt constitute a taxable dividend to the recipients? The taxes involved are for two years, that are particularly at issue in these two cases, the years 1946 and 1947. The deficiencies are in the amount of $1,882.27 for 1946 and $3,982.35 for 1947. All of these taxes are at issue with the exception of a very small $29 item which can probably eventually be audited out.

A brief background of this situation: The [7] Miller Paint Company is a local organization here in Portland, Oregon. It manufactures and sells at wholesale and retail paints and painting supplies. Along about 1946, we will take the early part of that, there were three brothers who owned the business in equal shares and operated under a partnership called the Miller Co. They had been together for about 30 years as equal shareholders—equal partners, rather. This was a family-run organization. About 1943 or 1944 Herbert B. Miller, now deceased, began to be sick, and this was very early, I think the evidence will show, called to the attention

of his two brothers, his two partners. We had a situation there then where we had a partnership where one of the partners possibly might not be living too long a time. So the partners became concerned—we think that the evidence will show this—in the continuity of the business; the first thing, the proper method of the liquidation of the interest of Herbert B. Miller in the partnership; the next, probably, that they had in their minds was just the mere simplification of the administration of the estate under the Oregon probate law, being there was a partnership interest involved; and one of the other partners had also a plan—the evidence will show this—that he wanted to leave some part of his capital stock, or all, to his employees.

Now, some general outline of the capacity, or the marital situation, of these parties would, I think, kind of point up the picture to you. Herbert B. Miller, the deceased the [8] evidence will show, had a wife and one child, a boy. Walter Miller, the other brother, was unmarried. Ernest Miller, the older brother, was married and had no children. With that background, as I said, one of the brothers, particularly Ernest, felt that his share in this business should properly be distributed to some of the old and faithful employees. And they went to counsel for this—the counsel is here to testify—to secure advice about what to do about this situation, which, they felt, was going to be imminent. And on the advice of counsel they took steps, and we think the evidence is conclusive and will absolutely show this, in that they valued the physical assets that were

used by the partnership—and I might say these are personal property as distinguished from real property, they did control some real property, but it was leased to the Miller Paint Co., which was the selling and manufacturing organization for paint, it was principally all personal property, no real property involved—they valued these physical assets, as we shall call them, at their fair market value and they organized a corporation with what me wight as well frankly admit, in other words, now as probably the lowest possible valuation with regard to capital stock. No-par-value corporations, I think our legal briefs will show, they have to have at least a thousand dollars to commence to do business. The capital stock, they authorized 300 shares at $3.50 apiece. They subscribed to those shares individually and paid for them by cash, the [9] evidence will show, from their own personal bank accounts. They then bought —we reinsist there was a sale—they bought the physical assets of the partnership that were used——

The Court (Interrupting): You mean the corporation bought?

Mr. Miller: The corporation bought the physical assets of the partnership that were used in the paint business, and they gave promissory notes in payment. They then valued a few little cats and dogs, principally, together with the accounts receivable which were there in the partnership and the corporation assumed the accounts payable, took over the accounts receivable and gave another note for the difference to the partners. At the same time they

drew $50,000 out of their bank account, I think the evidence will show, and they loaned that on another promissory note to the corporation, so that we have —one more thing they did, they gave a mortgage, the corporation gave a mortgage to the partners jointly to secure, not the $50,000 but to secure the, shall we call it, the note payable for the physical assets and the note payable for the accounts receivable, less the accounts payable. This ended up, I think the evidence is clear, with a debt structure of $174,000 which was owing to the partners, and through, step by step, that was eventually spread out into six notes of equal amount, three in the amount of $28,000 and three more of twenty-nine thousand some odd dollars. The evidence will show at the present time [10] that the $28,000 notes, payable to each one of these three partners and also to the decedent, are also all paid off at the present time, and the evidence will further show that the $29,000 notes have not yet been paid.

The longest term provided on any of these notes was six years. They will show, they will be offered into evidence, and we, of course, take the position that they were short-term obligations and that this was warranted by the earning capacity of the business.

Now, as part of the principal on the $28,000 notes was paid off, in 1946 and '49, $7,500 in 1946 and ten thousand in 1947, the government took the position, finally, that those were taxable dividends to the extent that they were paid out of earned income in the

corporation. And that is why you find the odd amounts with respect to this dividend income.

In 1948, on February 13, Herbert Miller died. Our evidence will show that the stock, which he paid $3.50 a share for, was inventoried in the estate, in the federal estate tax return, at a value of three hundred forty-seven dollars and some odd cents per share, and that the method of valuing the stock was based directly upon a capitalization of the earnings record. The notes were inventoried and appraised, were included in the federal and state tax returns at their face value and, in turn, they became part of the probate. Later the stock and the notes were transferred to a trustee, the United States [11] National Bank, which is the same organization which acted in another capacity, as the petitioner in this case, and that situation is, as our evidence will show, and under the terms of the will, will show now that the widow is entitled to a life income from the trust. It was after this that our deficiency notice came in with respect to the taxes which are under litigation here.

The Court: Is there an identical issue with respect to each of the three brothers?

Mr. Miller: What?

The Court: Is there an identical issue with respect to the—to each of the three brothers.

Mr. Miller: At the risk of going out of the record——

The Court (Interrupting): I am just inquiring as to an analysis as to whether the same problem exists with respect to each of the other two.

Mr. Miller: The other two brothers are still living. Therefore, to that extent, there is not the same problem.

The Court: Did they receive distributions on their notes?

Mr. Miller: They received distributions in like amounts. They, in other words, also received deficiency notices. As a matter of fact, those were paid and refund claims have been put in. Some of them have been denied just a short time ago. These are the only two cases which went to [12] the Tax Court. In other words, they were brought here by the bank to the Tax Court. The brothers and the widow personally, and one brother's wife, for all of the years involved, didn't stop the payment of interest and so forth, paid to deficiency, and are proceeding the other way. There is a sizeable, as you can imagine, amount of taxes that possibly may hinge upon the decision in this case.

One particular circumstance which we think the evidence will show, it points out some of the problem in this case, which we hope can be answered, it was in 1949 that a further payment was made on the principal of the same notes that are the source of the deficiencies in the years at issue. And in those years the testament of trust was taxed, they required a distributable dividend. At the same time, for the same amount of money, the widow was taxed as it being distributable from the trust. So the same sum of money was taxed in two different hands. So that, in generally outlining the situation, the evidence, in order to understand the situation as to

what might be involved, the trust and the estate and what has happened with respect to the probated estate are very definite considerations in this matter. It is the petitioner's position that, number one, there was no tax-free transfer under 112 (b) (5) and that the repayment of the indebtedness on these notes is not a taxable dividend to the recipient but rather a repayment of a debt. [13]

Mr. Welch: If it please the Court, I would like to point out what I consider the limitations on the issue involved in this particular proceeding. The statutory notice in each docket speaks for itself to this extent, it says that it has been determined that the $10,000 amount that the decedent received from Miller Paint Company, Inc., and excluded from gross income, included a taxable distribution in the amount of $9,687.36. Now, that is the respondent's determination. In order to enlighten the Court, we have endeavored to stipulate considerable background information. As a part of the stipulation we have included a statutory notice which was addressed to the corporation which more or less parallels the adjustments that were made in the income tax liability of Herbert B. Miller. In order to fully enlighten the Court, we have also introduced information with respect to the partnership, including the partnership and income-tax return, so that the Court will have the tax returns and the various proposed deficiency letters and statutory notices addressed to these various taxpayers. And we have also included in the stipulation a computation showing how we arrived at the amount of available earn-

ings and profits, which we consider were available for distribution at the time of these payments.

The Court: Is there any dispute between the parties as to the amount of earnings and profits, assuming that this did constitute a distribution? I understand the petitioner's [14] principal position is that this isn't a distribution, this transaction is in truth and in fact what it appears to be on its face, namely the payment of a note. My inquiry to the petitioner now is that, should he fail to sustain that position, does he contest the amount of earnings and profits to the corporation as being insufficient to support the distribution that the Commissioner has charged the petitioner with?

Mr. Miller: There would be an adjustment, if the Court would rule in our favor, that this was not a tax-free exchange, then that computation would have to go out the window because there would be a different basis of depreciation, and of course some minor adjustments would have to be made. I might say, though, there is no substantial dispute with respect to it. It's a matter of mathematics completely, Your Honor.

The Court: There is nothing for the Court to adjudicate, then?

Mr. Miller: It's a matter of computation of the tax after the Court rules on the basic issues.

Mr. Welch: I might point this out, Your Honor, in the statutory notice to the corporation certain deductions for interest were disallowed and treated as distributions of dividends. Now, those are picked up in this computation. They have been eliminated

from the available earnings and profit for the simple reason that they were actually paid and consequently wouldn't remain on the books. The other adjustments, to income, [15] were mainly those relating to depreciation, because of our refusal to permit the corporation to depreciate on the basis of the step-up in value at the time of the formation of the corporation. At least, respondent's position is that the book value and the assets on the books of the partnership would be the book value under Section 113(a)(7) of the Internal Revenue Code. So the controversy, as I see it, is on the question of the petitioner's principal contention that there was a sale which was in consideration of the delivery of certain purported notes. It's the government's position that, at least we haven't admitted so far, that these were actually notes, as far as we are concerned, those notes are merely indicative of risk capital because the total stock issuance of this corporation was $1,050, and the notes had a face value of some one hundred seventy-four thousand dollars.

In arguing this case, I propose to make reference to the cases involving thin incorporations, because——

The Court (Interrupting): Is there any doubt that this is a 112(b)(5) case at least in the extent of the stock that was issued to the partners?

Mr. Welch: As I understand this section it's an exchange of assets for stock and securities. Now, I do propose to argue that these notes are securities within the meaning of Section 112(b)(5) of the Internal Revenue Code.

Mr. Miller: No stock, Your Honor, and it's not their [16] contention, either, was acquired—and the stipulation takes care of that—for any of the assets of the partnership. The stock was paid for out of the personal bank accounts, $1,050. That is admitted. The only question we are talking about is the notes that are involved, and they encompass all items of value that were acquired from the former partnership. The stock itself, he is right, it is my understanding, too, the question is whether these are securities, there is another problem within the meaning of that section, being short-term notes.

Mr. Welch: I think that is all, Your Honor, except I do want to point out that the reference made by petitioner's counsel to the year 1949 and what the government did with respect to the widow and the trust, I consider irrelevant and not necessary in this proceeding for the decision of the case. We are dealing here with the actual years 1946 and 1947, of an individual. Although there is a lot of this background references material in here to enlighten the Court, the only thing that we are asking Your Honor to decide is whether these payments were for the distribution of dividends to the extent of available earnings and profits.

Mr. Miller: If the Court please, may I have the exhibits.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record. [17]

The Court: In connection with the stipulation of facts, as a result of discussion that I have just had with counsel off the record, it is my understanding that the agreement between counsel that Exhibits 1 through 16, referred to in the stipulation of facts, shall be received as part of the stipulation and as part of the record in this case.

Will you indicate your agreement to that, counsel?

Mr. Welch: Yes, respondent is in agreement with that.

Mr. Miller: Petitioner is in agreement.

The Court: Very well.

Off the record.

(Discussion off the record.)

The Court: On the record.

Mr. Welch: I would like to have the record show, Your Honor, that Exhibits H, I and joint Exhibits 1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G and 8-J, 9-K, 10-G are to be considered as a part of the stipulation of facts previously offered and received.

Mr. Miller: Petitioner agrees.

The Court: Very well.

Proceed.

Mr. Miller: I might say, in just further explanation of one factor, I might call the Court's attention to this, that when the sale of the assets was made, from the partnership to the corporation, they were sold at their fair market value, [18] which was greater than their adjusted value on the books of the partnership, so that there was a capital gain tax paid at that particular time on the sale of those

assets, which appears in the returns that have now been admitted into evidence.

I will call our first witness.

CHESTER E. McCARTHY

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address.

The Witness: Chester E. McCarthy.

Mr. Welch: This witness appears as counsel of record in both of these proceedings. I think the Court should be advised to that effect at this time. He is taking the stand as a witness in a proceeding in which he appears as counsel of record.

Mr. Miller: In the amended petition which has been filed, Chester E. McCarthy's name has been eliminated as counsel, so at this time we move to eliminate Chester E. McCarthy as counsel of record in Docket No. 28582, where his name still appears. Chester E. McCarthy will not argue this case or make any further participation in it.

The Court: What is the purpose of the government's calling this to my attention? Do you want me to rule on something? [19]

Mr. Welch: No, I think the Court should be advised and also Mr. McCarthy should be advised so there won't be any mistake, anything happen, either through inadvertence or otherwise, because of the problem involved, of a lawyer testifying in a case where he appears as counsel. And I think that the

(Testimony of Chester E. McCarthy.)

motion to withdraw takes care of the situation. I don't have any further motion to make in that connection.

Direct Examination

By Mr. Miller:

Q. What is your full name?

A. Chester E. McCarthy.

Q. What is your address?

A. A.P.O. 704, care of Postmaster, San Francisco, California, Headquarters 315th Air Division.

Q. What is your profession, Mr. McCarthy?

A. Well, presently I am a Major-General in the United States Air Force on duty in the Far East Air Forces. And prior to going on active duty this last time in April, 1951, I practiced law in the City of Portland, Oregon.

Q. Were you acquainted with Herbert B. Miller, deceased? A. Yes, I was.

Q. What was your first contact with him?

A. Well, my first contact with Herbert Miller was, oh, some period of time prior to World War II. He was a partner in the Miller Paint Company and I was practicing law in Portland [20] and handled some matters for his company at that time. Then I went on active duty with the United States Army Air Corps in 1942, returned to Portland from overseas about, I think it was March, 1942, returned to the office, the law office, and I again met him and his brothers at that time.

Q. Did they consult you professionally at that

(Testimony of Chester E. McCarthy.)

time? A. They did.

Q. What did they consult you about?

A. The first visit to the office was about, either the latter part of March, first part of April—I have it in my notes there—was concerning their concern for the continuity of their business in the event something should occur, like incapacity or untimely demise of one of the three brothers. And we discussed at that meeting and subsequent ones the best method of putting their business on a continuing basis in the event of the death of one of the brothers.

Q. Were these conversations you had with the decedent or with all of the brothers?

A. The first two or three were with all of the brothers, and then occasionally Herbert Miller would come up by himself or with one of the other brothers, and then on some occasions, the two brothers who are now in the courtroom, Ernest and Walter, came up without Herbert.

Q. Did they make any request for specific legal services to be performed by you? [21]

A. Yes, they did.

Q. What were those?

A. Well, I just stated in general what they were. And then, specifically, when we determined that a corporate method of doing business would probably be preferable to a partnership with take-out insurance policies for the estate of the decedent, I then reoriented myself on the law pertaining to it, got some outside consultation on the matter from Mr.

(Testimony of Chester E. McCarthy.)

Pattullo, and that led to the formation of the corporation.

Also wrapped up in this at the same time was the putting in order of the estate, particularly of Herbert Miller.

Q. Did you have any conversations in the early part of May or late April of 1946 with respect to any estate planning on the part of Herbert B. Miller, deceased? A. Yes, I did.

Q. What were the nature of those conversations?

A. Well, Herbert—now, you gave me a date there. What was the date again?

Q. The early part of May or the last part of April of 1946.

A. He wanted his will drafted. In addition to that, he was concerned about all of his assets being tied up in the paint company. He wanted to get those out of the company so that he could dispose of them by a testamentary trust or testamentary disposition to his widow in the case of his death and [22] also his minor son. That was tied up in a general conversation, I think it was with Ernest Miller, who had another mission that he wanted to accomplish, by getting his assets out of the company also, he wanted to leave the paint business proper to some of the old employees upon his death. And it was for that reason that we determined to organize the corporation, leaving the business as such, that is, having the business carried on by the corporation, but taking the money assets into the individual hands of the former partners. That is the

(Testimony of Chester E. McCarthy.)

reason the transaction took in the form that it did. And it was right after that that I did form the corporation.

Q. Did you then act as an attorney for the corporation, Miller Paint Co.? A. I did.

Q. As such attorney, did you prepare and type and keep the minutes of that organization?

A. I prepared, dictated the minutes, and they were typed in my office.

Q. During the years 1946 and '47, were you present at all of the meetings of the stockholders and board of directors of Miller Paint Company?

A. I was.

Q. I hand you now exhibit marked "25" pursuant to the stipulation. I will ask you to examine those photostats. Do you recognize them? [23]

A. They are minutes of the Miller Paint Company, pages 10 through—well, now, wait a minute—pages 10, 16, 17—on page 17 appears the signatures of Walter Miller as secretary and H. B. Miller as chairman. On page 18, on the minutes of the meeting of June 3, 1946, are the signatures of the three Miller boys. And pages 19, 20, 21 with signatures, 23, 24 with signatures—these are copies of——

Q. (Interrupting): Have you had occasion to read those minutes, reread those minutes just recently? A. Yes, I have.

Q. Are they accurate minutes, of exactly what transpired as of the dates that are indicated within those transcribed minutes?

A. They are. They are a correct recording of

(Testimony of Chester E. McCarthy.)

the actions of the officers of the corporation, acts as of the date they bore. They may not have been actually formulated and signed on that particular date, but they were the actions as of the date they bear.

Mr. Miller: I offer those in evidence, Your Honor, Exhibit No. 25.

Q. (By Mr. Welch): These were typed in your office?

A. The originals were typed in my office, yes, sir.

Q. The originals are in the courtroom?

A. I think they are. [24]

The Witness: Do you have the minute book here?

Mr. Miller: Yes, sir.

Mr. Welch: Thank you.

Mr. Miller: Is there an objection, Mr. Welch?

Mr. Welch: I am entitled to inquire and then make my objection, I understand.

Q. (By Mr. Welch): They were dictated by you, sir? A. That is right.

Q. Do you recall who was present when you dictated those?

A. Probably at the time the actual dictation was made, no one, because I used either dictaphone or dictagraph, whichever machine I happened to have at that time. I dictated from notes I usually take when I am sitting in on a board of directors meeting or stockholders' meeting.

Q. Do you recall where these meetings were held? A. My office.

(Testimony of Chester E. McCarthy.)

Q. Your office?

A. Now, I say "my office." There were a couple of meetings which may have been held—I don't think these were the ones, however, it was later on —over at the Miller Paint Company itself. I would sometimes drop by there when the brothers were there. But these were, I am sure, held in my office.

Q. Are you an officer of the corporation?

A. No, sir, I am not.

Q. You were the attorney for the corporation? [25] A. That is correct.

Q. At the time these meetings were held?

A. That is correct.

Mr. Welch: No objection.

The Court: It will be admitted.

The Clerk: Petitioner's Exhibit 25 admitted in evidence.

(Petitioner's Exhibit No. 25 was received in evidence and marked Exhibit No. 25.)

Q. (By Mr. Miller): I hand you now Exhibit No. 17 and ask you if you recognize those photostats of those documents, as to what they are?

A. I do. They are three promissory notes, each made and executed by the Miller Paint Company. They bear the seal of the Miller Paint Company and the signatures of Herbert B. Miller as president and Walter Miller as secretary. In each case they are the signatures of those officers, that is, the originals of which this was a photostat were prepared in my office and were executed in my office.

(Testimony of Chester E. McCarthy.)

Q. But did you actually prepare the notes?

A. Yes, I did. That is, I supervised their preparation. They were typed by the girl in the office.

Q. The note referred to on page 16 of Exhibit 25, the $50,000 note, do you recognize that note on Exhibit 17?

A. Yes, it's the second one on the bottom of this, or [26] on this page, Exhibit 17, the second photostat.

Q. And that is the note that is referred to on that particular page? A. That is correct.

Q. Do you recognize a note in the amount of $86,622.49, which appears on page 19 of Exhibit 25?

A. Are you sure you have got the right page here —oh, here at the top. It begins on the previous page. It begins at the bottom of page 18 and is concluded at the top of page 19. In other words, the supporting minutes for the note of $86,622.49 is at the top of Exhibit No. 17.

Q. Now will you refer to page No. 20 of Exhibit No. 25 and examine Exhibit No. 17 and one of the notes thereof and see if that is a note that grew out of the note authorized to be issued on Exhibit 25, page 20?

A. That is correct. It is page 20 of Exhibit 25. This appears to be the supporting minutes for the note at the bottom of the photostatic Exhibit No. 17, $37,948.77.

Q. Do you recognize the signature of Walter Miller crosswise on those notes?

A. I do. It's on Exhibit 17.

(Testimony of Chester E. McCarthy.)

Q. Are you familiar with his handwriting?

A. I am. That is, I saw him write it.

Mr. Miller: I will offer Exhibit No. 17 in evidence. [27]

Q. (By Mr. Welch): Mr. McCarthy, did you testify that these signatures were placed on there in your presence? A. That is right.

Q. And that this note here with regard to cancellation, you say you saw that written?

A. That is right, it was done in my office.

Q. It was all done in your office. This is a little difficult to read——

A. ——Just hold it down this way (demonstrating).

Q. Would you read to the Court the date of the cancellation? A. Well——

Mr. Miller: Would it assist you to examine the original?

A. ——July 31, 1946—I will read this one here, I can read it on this one here, I assume these were done all at the same time—July 31, 1946.

Q. (By Mr. Welch): There was no payment at this time, to your knowledge, of any of these?

A. No; there were notes substituted for these in the exact total sums, the transaction merely being one of submitting these notes which were made payable to, I believe, all three brothers, and reissuing notes in the same aggregate sums, but one-third each to the individuals so that it wouldn't tie [28] up the property of two brothers in the event something happened to the third. That was the purpose

(Testimony of Chester E. McCarthy.)

of the cancellation of these notes here, and the substitution, I think, of like date.

Q. To your knowledge, these notes never left your office, then?

A. I won't say that. They were with the—they may have left the office by one of the officers of the company. Sometimes we kept files in our office of Miller Paint Company, and to the extent that those files were labeled "Miller Paint Co.," they were the company's records. I won't say those notes never left my office. They might have.

Q. Two of them bear the date June 1, 1946 and the other bears the date June 3, 1946. And the cancellation was sometime in July, probably July 31?

A. That is right. And I think the variance in those dates, the bottom one which bears the date June 3, was predicated upon some computations which were made of—I am sure that is the one that was for the difference between the accounts receivable and the accounts payable. That probably accounts for the difference in the date. I can tell you in a second here, if you will hand me my book there.

The Witness: Will you hand me my book, Mr. Miller?

Mr. Miller: Yes.

A. ——Yes, those notes were probably prepared on June 1, which was a Saturday, and executed, [29] and in anticipation of signing on Monday, June 3. They could have been signed on June 1 also because the Millers were in the office on June 1, 1946.

(Testimony of Chester E. McCarthy.)

Q. That is, Herbert Miler and also Walter Miller were in the office at that time?

A. Yes, sir. And I think probably Ernie was with them on that occasion, and for the several days just previous to that time, they were in and out of the office several times. I can't say—these entries here were not for the purpose of making, of offering testimony. They were records for the purpose of making charges for services rendered. In other words, a record of time devoted to each task and for each client. I do recall that on more than one occasion, a few occasions, Ernest Miller and Walter Miller alone came up. It was on one of those occasions that they gave me the immediate reason for their concern, in changing the business from a copartnership to one which would permit it to continue in the event of the death of one of the brothers. They had learned that Herbert Miller was afflicted with cancer and that he, so far as they knew, did not know that; his wife knew it, Blanche Miller, and Ernest Miller and Walter Miller knew it, but they did not want to discuss that reason in his presence and it was during his absence that reason was given to me, and that was one of the reasons we put forth quite a bit of pressure in starting a corporation at the earliest possible date, which was agreed upon, I think, June 1. [30]

Mr. Welch: I have no objection.

The Court: Admitted.

The Clerk: Petitioner's Exhibit 17 admitted in evidence.

(Testimony of Chester E. McCarthy.)

(Petitioner's Exhibit No. 17 was received in evidence and marked Petitioner's Exhibit No. 17.)

Q. (By Mr. Miller): I hand you Petitioner's Exhibits 18 and 19 as marked for stipulation, and I ask you to refer to Petitioner's Exhibit No. 25, page No. 23, and determine whether those notes are the substitute notes as mentioned in the minutes of a meeting which was held on July 31, 1946, of the board of directors of Miller Paint Co., Inc.

A. Well, the Exhibit No. 19, with the sum $29,316.26, is referred to on page 23 of the minutes identified.

Q. Will you turn to the following page and see if the other note is referred to, Exhibit No. 18?

A. Yes. Exhibit No. 18 is supported by minutes at page 24, that being the sum of $28,174.16.

Q. Do you recognize the signatures on those notes?

A. I do. Exhibits No. 18 and No. 19 are signed by Miller Paint Co., Inc., by H. B. Miller, President, and Walter Miller, as Secretary, and is also Exhibit No. 19, and each has the corporate seal on it.

Q. Do you know whether those notes were [31] delivered to Herbert Miller? A. They were.

Mr. Miller: I will offer Exhibits——

The Witness (Interrupting): There again, now, I am aware of the stipulation of these, I have testified concerning certified copies, photostatic copies. The originals——

(Testimony of Chester E. McCarthy.)

Mr. Miller (Interrupting): Are in the courtroom, in my possession.

The Witness: I wanted the Court to understand that these aren't the originals, these are photostatic copies.

Mr. Miller: I will offer those in evidence, Exhibits 18 and 19.

Q. (By Mr. Welch): Mr. McCarthy, you say, these were prepared and signed in your office?

A. That is correct.

Q. You saw the signatures, is that correct?

A. That is correct.

Q. If you will examine Exhibits 18 and 19 for identification, I see they bear the date, each of them, June 1, 1946. Will you explain how that date happens to appear there?

A. Yes. These were notes which were made to substitute for the ones on Exhibit 17, which notes bore the original date of June 1, and, as I testified a moment ago, we wanted to submit these notes into three parts, each representing the interest [32] of the individual Miller brother, rather than having all three names on one note. So, when these substitutes were prepared and the consolidated notes canceled, I dated them the same date as the notes for which they were substituted. As a matter of fact, the minutes, I can tell you exactly when those notes were prepared, because the minutes which support them show that the meeting was held on the 31st day of July, 1946—I am sure that is the date it was—my date book shows that they were in the

(Testimony of Chester E. McCarthy.)

office on the 31st of July 1946, and the minutes specifically stated that the notes should bear the date of 1 June.

Mr. Welch: There is no objection to Exhibits 18 and 19.

The Court: They are admitted.

The Clerk: Petitioner's Exhibits 18 and 19 admitted in evidence.

(Petitioner's Exhibits Nos. 18 and 19 were received in evidence.)

Q. (By Mr. Miller): Is there anything further, Mr. McCarthy, which you can add, which you can testify to, concerning the formation of this corporation?

A. Only one other thing I can think of——

Mr. Welch (Interrupting): I object to the form of the question. I think I am entitled to a little more specific question than the manner in which it was framed. [33]

Mr. Miller: It's not leading, it certainly isn't. It's a very general question in regard to his recollection.

The Court: I think you had better make the question more specific.

Mr. Miller: That is all.

Mr. Welch: I have no questions, your Honor.

The Court: I would like to ask one thing of the witness. Perhaps he has already so testified, but just so that I might have it clear in my mind.

(Testimony of Chester E. McCarthy.)
By the Court:

Q. I think you spoke once or twice of changing the business from a partnership into a corporation, or using language somewhat to that effect. I would like to know whether the entire series of steps were all contemplated as part of the basic transaction, that is, the incorporation of the new corporation, the issuance of its stock, followed by the transfer of the partnership assets to the new corporation for notes, whether all these were parts, were steps in connection with the basic objective of turning the partnership business into a corporate business?

A. I think probably not, because prior to the actual beginning of business, paint company business by the corporation, it was formed, the corporation was formed a little ahead of that, stock was issued for cash, the stock was paid for by each of the brothers individually by check upon their [34] personal bank account, and the corporation was formed was entitled to do business as a separate entity before the partnership ceased doing business. And, as soon as the administrative work of determining the value at which the assets should be sold and at which the corporation's items were determined, then they were purchased by the corporation from the three Miller brothers and notes were executed for the goods, wares, and merchandise, on the one hand, for certain other personal property such as trucks, some office furniture, as I recall it, some other small amounts of personal property, and then

(Testimony of Chester E. McCarthy.)

some days later, but as a separate transaction, they bought the accounts.

Q. Well, I understand it was a separate step. My question, I think, cuts a little deeper than your answer, and I am not sure that your answer has been responsive to my question. Perhaps my question wasn't clear enough. My question really goes to the point of whether, at the time of the creation of the corporation, it was contemplated that as part of the over-all picture, that the corporation would acquire the operating assets or a substantial portion of them, of the operating assets of the partnership. A. That is correct.

Q. That was contemplated? A. Yes.

Q. In other words, the so-called transfer of the assets for the notes was contemplated at the very beginning, at the [35] time that the corporation was organized?

A. Not necessarily a transfer of the assets for notes. That was a sale and was kept from the very beginning. It was intended to be and take the form of a sale.

Q. My question is, was it intended that such a transaction should take place from the very beginning—whether you call it a separate transaction or not, that is for me to determine whether it should be treated as separate or not—I am asking you whether that transaction was contemplated from the very beginning.

(Testimony of Chester E. McCarthy.)

A. I don't think that the form or the amounts was, no.

Q. I am not asking you about the amounts. I am asking you whether at the time the corporation was formed, whether it was contemplated that the operating assets of the partnership would be transferred to the new corporation?

A. I think that is a fair statement, yes. I don't know, we never discussed at the initial meetings what would happen to, for instance, the accounts receivable and the accounts payable, that developed when we got the corporation set up, got Mr. Pattullo into the scene, making an audit, but it was intended to operate the Miller Paint Company business as a corporation.

Q. That answers my question, that is, that the corporation, the creation of the new corporation was intended to operate the Miller Paint Company business, that is, that business [36] which had formerly been operated as a partnership?

A. That is correct.

Q. And that various steps would have to be taken subsequent to incorporation in order to achieve that initial objective?

A. Well, the initial objective, your Honor, was, I think it's more accurate perhaps to state that the formation of a corporation was incidental to the main objective. The main objective was to take care of the eventuality which two of the brothers knew was going to take place, in which I checked with the doctor who was treating Herbert Miller, that he was

(Testimony of Chester E. McCarthy.)

afflicted with cancer and his days were numbered. They had previously gone to the United States National Bank, the trust department, some few months before I got back from overseas, investigating a possible method of another type of partnership, or rather an agreement offset by insurance policies, to take one of the partner's estate out in the event of his death. Nothing came of that, but they brought up that fact to me in my office at our initial meetings after I got back here in March. Their main concern was to create an entity which would be continuing upon the death of Herbert Miller, who was then the marked one, and also to permit him to get out of the business cash which he could, which would be unencumbered and would not be tied up in a partnership dissolution in the event of the demise of one of the partners, for his estate, for his wife and his minor son. [37]

Q. From what you tell me, then, I conclude that the creation of the corporation, that is, just the mere framework of the corporation, was the first step toward the corporation's acquiring the operating assets of the business?

A. Well, the formation of the corporation would naturally be a necessary first step before it could do anything, it was formed, its stock paid for and was set up, ready to do business. It couldn't have been otherwise, because it wasn't a legal entity until that was done.

(Testimony of Chester E. McCarthy.)

Further Direct Examination

By Mr. Miller:

Q. In line with the judge's question, was it contemplated at the time of this formation and the acquiring of the assets of the partnership that those assets, or their value, should have been irretrievably given to the corporation?

A. No, not at all, it was a sale to the corporation.

Mr. Welch: I object to the form of the question. I think it's definitely leading.

Mr. Miller: It's in the same form as the judge asked his question.

The Court: The question may stand.

The Witness: We are all lawyers. I think we know what we are trying to get at here. I didn't go into this blindly. That is for sure. I got tax advice on it, when I knew a tax question would be involved. And I intended to make a sale to [38] the corporation and accept notes in payment for the goods, wares, merchandise and accounts that were transferred over. That is what we intended to do. That is what we did do.

Q. (By Mr. Miller): Did you go into the earning record of the partnership prior to the formation of this corporation?

A. Well, I don't remember whether we did or not. Some of this work was done—my main object at that time was to get the corporation set up, the assets sold to it. Mr. Pattullo was called in for consultation. As a matter of fact, we got quite a little

(Testimony of Chester E. McCarthy.)

ways along before we went into the question which arises in practically every business transaction, that was, tax resulting, because whatever the tax result would have been, this corporation would have been formed, for the reasons already stated, but we did ask Mr. Pattullo for his opinion on the tax effect, tax result on it, and he rendered an opinion to me for, on behalf of, the Miller brothers. But whether I went in to figure up the earnings of the corporation, I can't truthfully say at this time that I did or did not. That has been some eight years ago.

Q. The question was whether you went into the early record of the partnership?

A. I meant partnership, not corporation. I don't know that I did. Mr. Pattullo may have.

Mr. Miller: I think that is all. [39]

Cross-Examination

By Mr. Welch:

Q. Then, Mr. McCarthy, you virtually ignored the tax problem in this transaction?

A. Ignored it?

Q. Ignored it.

A. No, I surely did not ignore it. That isn't my testimony.

Q. But it is your testimony that the tax effect has no bearing on the actual transaction, so far as consummation is concerned?

A. The tax effect?

Q. Had no effect?

A. It's had an effect obviously, but the real rea-

(Testimony of Chester E. McCarthy.)

son for the organization of the corporation and the initial reason they came to my office, as they stated—I had stated—was to form an entity that would continue the business, on the one hand, after the death of one of the partners, and on the other hand, it would permit that partner to take out his cash for a separate estate, and Ernie Miller would be placed in a position where he could leave, upon his death, the business, without the large cash assets in there, to his employees.

Mr. Welch: I have no further questions.

The Witness: I think the—well, Mr. Pattullo can testify to that—the dates that I saw him were some time subsequent to this. [40]

(Witness excused.)

The Court: We will have a short recess.

(Short recess.)

The Court: The court will be in order.

Mr. Miller: We will call Ernest Miller.

ERNEST MILLER, JR.

was called as a witness by and on behalf of the petitioners, and having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: Ernest Miller, Jr., 13310 South Kuehn Road, Portland.

Direct Examination

By Mr. Miller:

Q. Are you the brother of Herbert B. Miller, deceased? A. Right.

Q. Would you outline to the Court generally a little bit of background about the Miller Paint Company prior to 1945?

A. Well, the Miller Paint Company started way back in the early '90's; it was started by my father, as a matter of fact. And I came into the picture about 1909.

Q. Are you the oldest brother? A. Yes, sir.

Q. When did the other brothers come into the picture?

A. Well, they came in, well, Herbert came in about six [41] years later—I think it was six or seven years—and Walter came in another three or four years later. I don't remember exactly the years. And we started in a small way, of course, beginning with a retail store and we gradually branched into the wholesale business and eventually we started a little manufacturing. That is about it.

Q. For about how long prior to 1946 had you,

(Testimony of Ernest Miller, Jr.)

Walter Miller and Ernest Miller, been equal owners of Miller Paint Company?

A. Well, we were equal owners from the time we entered into the business. I would say approximately 25 years, on an average.

Q. Other than this Miller Paint Company, did you and your brothers have any financial dealings among yourselves? A. Occasionally, yes.

Q. What were these occasions?

A. We occasionally bought some securities together, and, of course, we bought real estate together, we bought our properties together. That would be the extent of it.

Q. Have you ever had joint bank accounts?

A. Yes, joint bank accounts, of course.

Q. Were all of these connected with the Miller Paint Company business, these joint bank accounts?

A. Yes.

Q. Starting along about 1943 or 1944, I wish you would [42] outline to the court two things, what problems faced Miller Paint Company as a business, what problems faced the Miller brothers individually? Just outline in your own words——

A. You mean the three Miller brothers?

Q. The individual problems, yes, and then the problems that faced the business itself.

A. Well, first problem that faced my brother Walter and I was the fact that we knew my brother Herbert was going to die. That was one of the most serious problems we had facing us.

Q. To the best of your recollection, when did you

(Testimony of Ernest Miller, Jr.)

first know that? A. That was in 1943.

Q. Did you consider that a business or a personal problem?

A. Well, it was both. It was a business problem, it affected the business, and it affected each one of us individually, that is, it affected my brother Walter and I as individuals.

Q. How did it affect you and your brother Walter individually?

A. Well, we knew if and when my brother Herbert died there would be some complications in the partnership.

Q. What kind of complications would those be?

A. In connection with the distribution of the assets of [43] the business, the partnership. As a matter of fact, I had a consultation with the bank, with a bank executive, and was advised to that effect.

Q. What bank was that?

A. It was the U. S. National Bank.

Q. I hand you Exhibit 24, petitioner's Exhibit No. 24, and ask you if you recognize that photostatic copy of a document? A. Yes, I do.

Q. What is that?

A. That is a letter addressed to myself and my two brothers, outlining a way we could set up the thing to avoid any complications in the event of the death of either one of us.

Q. And the date on that was what?

A. 9/7/1945.

Q. Did you receive this paper from the United

(Testimony of Ernest Miller, Jr.)

States National Bank? A. Yes.

Mr. Miller: I offer petitioner's Exhibit No. 24 in evidence.

Q. (By Mr. Welch): Mr. Miller, do you know who signed the original of this particular document?

A. It was McKay, I believe. [44]

Q. I ask you to examine the bottom of page 2 and tell me who signed it, if anyone signed it.

A. You mean this initial here, you are referring to?

Q. Well, I don't know what it is.

A. Well, I don't recall that initial, I don't know who that—what that would be.

Q. Will you turn over and look at the face of page 1 of that document and tell me to whom that is addressed, if anybody?

A. Miller Paint Company, 732 Southwest First Avenue, Partners Ernest Miller, Herbert B. Miller and Walter Miller.

Q. Is it your testimony that that is addressed to the Miller Paint Company——

Mr. Miller: Maybe I can clear that up——

Q. (By Mr. Miller): Did you receive it?

Mr. Welch: I will ask the questions, if you don't mind, and then you can inquire further, if you like.

Q. (By Mr. Welch): It is your testimony that it's addressed to Miller Paint Company?

A. Right.

Q. And it says "Re (Colon)." Does that indicate a form of address?

(Testimony of Ernest Miller, Jr.)

A. I suppose, I suppose it does.

Q. On its face, it appears to be a memorandum, not addressed to anyone? [45]

The Court: Well, I think you are arguing with the witness. The paper speaks for itself.

Mr. Welch: I will object to the admission of petitioner's Exhibit for identification No. 24 on the grounds it hasn't been properly identified and on the further grounds it's irrelevant and immaterial.

The Court: I think it was sufficiently identified when this witness said he received it from the bank, and evidently, or apparently, it contains the discussion thus far, it contains considerations and material relating to the continuity of the business. I will admit it.

The Clerk: Petitioner's Exhibit No. 24 admitted.

(Petitioner's Exhibit No. 24 was received in evidence.)

Q. (By Mr. Miller): Did you and your brothers talk over the advice that that memorandum contained? A. Yes.

Q. What was the nature of those conversations, if you recall?

A. Well, we talked about whether it would be advisable to incorporate or not.

Q. Did you do anything immediately with respect to that? A. No.

Q. Do you recall the first meeting between yourself, your [46] brother, Herbert B. Miller, your brother, Walter Miller, and Chester McCarthy?

A. Yes.

(Testimony of Ernest Miller, Jr.)

Q. About what time do you recall that meeting was?

A. Well, it was sometime during the year of 1945. I don't remember the exact date.

Q. Are you positive it was '45? A. Yes.

Q. Do you know when Chester McCarthy returned from the service?

A. No, I don't recall exactly the date he returned from the service.

Q. Was it after he returned from the service that you had the conversation?

A. Yes, it was after he returned.

Q. Did you call upon him for advice with respect to the problems which you were facing?

A. Yes, I did.

Q. Did you outline those problems to him?

A. Yes.

Q. What do you recall were the conversations with respect to the problems that your business faced? Did you outline them to Mr. McCarthy and ask for a solution?

A. Well, the principal thing I talked about was my brother's condition of his health and what should be done about [46A] it, what could be done about it, to avert any trouble, in case something should happen to him, along the lines of this letter that I received from the bank.

Q. Did you discuss with him, in other words, your personal desires with respect to the disposition of the business at your death? A. Yes.

(Testimony of Ernest Miller, Jr.)

Q. What did you tell him in connection with that?

A. Well, I told him in the event of my death, I would, I sort of felt I would like to leave my portion of the business to some of the old, loyal employees. I thought possibly that by incorporating, it would be better handled that way.

Q. Did you want to leave the full value of your business to the employees, that you owned?

A. The full value of the assets of the business, yes.

Q. These meetings in the early part of June, 1946, the latter part of May, 1946, did you attend those meetings, as outlined by Mr. McCarthy on the stand? A. I did.

Q. Do you recall, in other words, from your own independent recollection, what steps were taken in the formation of Miller Paint Co., Inc., and the dissolution of the Miller Paint Co., the partnership?

A. Do you mean what steps were taken in a legal way?

Q. Yes. [47]

A. Well, I couldn't recite them exactly. I don't —they are all down in black and white, the steps that were taken.

Mr. Miller: May I have Exhibit No. 25?

The Clerk: Yes, sir.

Q. (By Mr. Miller): Do you recognize these as meetings of the board of directors of Miller Paint Co., Inc., held on the 20th day of May, 1946, June 3, 1946, and July 31, 1946? A. Yes, I do.

Q. Is it your testimony that those minutes are

(Testimony of Ernest Miller, Jr.)

accurate as to what happened at the meetings on the dates indicated? A. Yes.

Mr. Miller: That is all.

Cross-Examination

By Mr. Welch:

Q. Mr. Miller, I will hand you Petitioner's Exhibit No. 18, which has been previously identified in this proceeding as a promissory note of Miller Paint Company, Incorporated. I will ask you if your signature appears on that photostat?

A. No, it doesn't.

Q. Do you recognize the other signatures there?

A. Yes.

Q. You are familiar, are you not, with the various notes that are involved in this particular proceeding? A. Yes.

Q. Would you state to the Court, if you will, the amount [48] of the installment that is set out on the face of the note as being due under this obligation. Starting about the fifth line down. What does that say there (indicating)?

A. "Shall be payable in annual installments of not less than $166.66 in any one payment, plus the full amount of interest due on this note at the time of payment of each installment."

Q. Well, tell the Court, if you know, what installments were paid. Before you answer that question, I can make this statement, it has been stipulated, for purposes of deciding this case, that your brother, that is, Herbert B. Miller, received $7,500, on or about November 30, 1946, and $10,000 on November 30, 1947. Now, what I want you to ex-

(Testimony of Ernest Miller, Jr.)

plain to the Court is why the amounts of the installments are different than is shown on this note.

A. Well, the payments that were made to me were paid on the basis of this note.

Q. Would you know why the payments were larger? A. To Herbert and Walter Miller?

Q. It's been further stipulated that equal amounts were paid to Walter Miller and Ernest Miller, Jr.——

The Court (Interrupting): Are you referring to paragraph 12 of the stipulation?

Mr. Welch: Paragraph 12 of the stipulation.

Q. (By Mr. Welch): What I want you to explain to the Court, if you can, is why the amounts, why the installments, [49] which were actually paid—I don't think there is any controversy about that—are different than the amount set out in that instrument, that is, why more was paid than is set out there.

A. I don't have any recollection of any larger amounts having been paid.

Q. What is your title?

A. Secretary-treasurer.

Q. You have always been the secretary-treasurer? A. At one time I was vice-president.

Q. Has Miller Paint Company, Incorporated, ever paid to the stockholders a dividend other than the amounts which are here in controversy in this proceeding? A. No.

Mr. Miller: I object to that question. That implies there was a dividend. The form of the question

(Testimony of Ernest Miller, Jr.)

implies a yes or no on that. Either one of them would be an admission that there was a dividend. That is the element in issue.

The Court: That is the very question before the Court.

Mr. Miller: That is right.

The Court: I will not assume that the answer that the witness gives to the question admits the only real issue that is before us.

Mr. Miller: If he would care to rephrase the question and ask if any dividend has ever been declared by the board of directors, all right. [50]

Mr. Welch: I have no further questions, your Honor.

The Court: Are you going to seek an answer to that inquiry?

Mr. Welch: Could I have that question reread, for the purpose of my rephrasing it?

(Last question and answer read.)

The Court: I will accept that answer and I will accept it as not admitting the only issue that is before us.

Mr. Welch: Then, I state to the Court I have no further questions.

Redirect Examination

By Mr. Miller:

Q. Has Miller Paint Company ever declared a dividend since its formation? A. No.

(Testimony of Ernest Miller, Jr.)

Q. Miller Paint Company, Incorporated?

A. No.

Mr. Miller: That is all.

(Witness excused.)

Mr. Miller: Walter Miller.

WALTER MILLER

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please. [51]

The Witness: Walter Miller, 317 Southeast Grand Avenue, Portland, Oregon.

Direct Examination

By Mr. Miller:

Q. What is your present occupation?

A. I am president of the Miller Paint Company, Inc.

Q. At the time that Miller Paint Company was first incorporated, what was your office?

A. I was secretary-treasurer.

Q. Do you recall, in the latter part of 1945, early part of 1946, the problems that faced Miller Paint Company and yourself, personally, if any?

A. Well, as was stated before, the main problem was the health of our brother Herb, who, we knew, had a diagnosis of cancer and was given a few years to live. And our second problem was to get

(Testimony of Walter Miller.)

our affairs in order so we could continue with our, so the Miller Paint Company could be clear, and to get our assets, I mean our value, out of the Miller partnership. Our thought was to get the Miller Paint incorporated so Miller Paint Company would still keep on going, in the case of the death of any one of our partners.

Q. Do you recall conversations with Chester McCarthy in the latter part of April and the first part of May, 1942?

A. Yes, we had several meetings.

Q. Do you recall any of the conversations in which you [52] went into the earning record of the Miller Paint Company, the partnership?

A. Yes, I recall that very clearly. Mr. McCarthy asked me the earnings of the Miller Paint Company, partnership. And I told him they were very good and so forth, gave him the amounts.

Q. Do you recall those amounts, by any chance, that you gave? A. You mean profitwise?

Q. Profitwise or——

A. (Interrupting): Well, I don't exactly. I wouldn't want to say. They were substantial amounts. They were very healthy amounts. That was during those days of growing business in the company.

Q. In other words, Miller Paint Company was a profitable business? A. Yes.

Mr. Miller: May I have Exhibit No. 25, please?

The Clerk: Here (indicating).

Q. (By Mr. Miller): I hand you Petitioner's

(Testimony of Walter Miller.)

Exhibit No. 25, which has been admitted in evidence, which is photostatic copies of minutes of the meetings of the board of directors on the dates of the 20th day of May, 1946, June 3, 1946, and July 31, 1946. I will ask you if you recall those meetings.

A. Yes, these are all all right. I recall them. [53]

Q. Do those minutes reflect exactly what transpired at those meetings? A. That is right.

Q. Does your signature appear on those minutes? A. As secretary, yes.

Mr. Miller: Would you mark these for identification petitioner's 26.

The Clerk: Petitioner's Exhibit No. 26 marked for identification.

(Petitioner's Exhibit No. 26 was marked for identification.)

Mr. Miller: And would you mark this for identification petitioner's 27.

The Clerk: Petitioner's 27 marked for identification.

(Petitioner's Exhibit No. 27 was marked for identification.)

Mr. Miller: And please mark this for identification as petitioner's No. 28.

The Clerk: No. 28 marked for identification.

(Petitioner's Exhibit No. 28 was marked for identification.)

Q. (By Mr. Miller): I hand you Petitioner's

(Testimony of Walter Miller.)

Exhibit No. 26 and ask you if you recognize what it is? A. Yes, that is our general ledger.

Q. For what period of time? [54]

A. Well, let's see. This is to the first half of 1946. This would be Miller Paint Company, the partnership.

Q. To June 1, 1946? A. '46, yes.

Q. Does that also contain your journal, too, that book? A. Yes, I think it does, yes. Yes.

Q. Are those books kept under, were they kept under your supervision?

A. Yes, in my office, right where I have my office.

Q. And you consider them true and accurate in all particulars? A. Yes, we do.

Mr. Miller: I offer Petitioner's Exhibit No. 26 in evidence.

Q. (By Mr. Welch): This book which has been marked Petitioner's Exhibit No. 26 is the ledger for the partnership?

A. For the first six months of the year.

Q. That is, on the cover it bears the date June 1, 1946? That would be the closing date?

A. That would be the closing date of the partnership, yes.

Q. That would be the closing date of the partnership? A. Yes.

Mr. Welch: No further questions.

The Court: I will admit Exhibit No. 26 in full, but I [55] admit it only on condition that counsel draw to my attention those portions of 26 that it

(Testimony of Walter Miller.)

wishes the Court to take into account. The Court has no intention of making a fishing expedition through Exhibit No. 26 to find one little piece of evidence on one page and another piece on another in an attempt to construct some theory or other. P-26 will be admitted and considered by the Court only to the extent that the counsel specifically draws attention to portions of 26 that counsel wishes the Court to consider.

Mr. Miller: That is fair enough.

The Clerk: 26 is admitted.

(Petitioner's Exhibit No. 26 was received in evidence.)

Q. (By Mr. Miller): I hand you Petitioner's Exhibit No. 27 and ask you what that is.

A. This is the second half of the, second six months of the corporation here. Let's see, would that be six months?

Q. Is this the corporation books or the partnership books? A. Corporation books.

Q. Is this the ledger and the journal?

A. Yes.

Q. Are they kept under your supervision?

A. That is right.

Q. Would you say they covered the period from June 1, 1946 [56] to November 30, 1946?

A. That is right. Five months.

Q. The fiscal year? A. That is right.

Q. Are these records kept in the ordinary course of business? A. Yes.

(Testimony of Walter Miller.)

Q. And you consider them as true and accurate?

A. Yes.

Mr. Miller: We offer No. 27, subject to the same ruling by the Court.

Mr. Welch: No objection, your Honor.

The Court: Exhibit No. 27 will be admitted subject to the same conditions as 26.

(Petitioner's Exhibit No. 27 was received in evidence.)

Q. (By Mr. Miller): I hand you herewith Petitioner's Exhibit No. 28 and ask you if that is the journal and ledger of Miller Paint Co. beginning December 1, 1946, and ending November 30, 1947.

A. That is right.

Q. Was that book kept under your general supervision? A. It was.

Q. Is it true and accurate in all particulars?

A. It is. [57]

Mr. Miller: We offer Exhibit No. 28.

Mr. Welch: No objection.

The Court: It will be admitted subject to the same conditions as the two preceding exhibits.

The Clerk: Petitioner's Exhibit No. 28 received in evidence.

(Petitioner's Exhibit No. 28 was received in evidence.)

Mr. Miller: May we have permission from the Court to withdraw those for the purpose of preparing photostatic copies?

(Testimony of Walter Miller.)

The Court: I would prefer to work with the originals. If you wish, you may withdraw the copies to work with yourself. But I would prefer to have the originals myself. Similarly, the government may withdraw them at the time it comes to preparing its brief and retain them as long as it wishes prior to the submission of the briefs.

Mr. Welch: May we have them prior to the filing of the briefs?

The Court: For the preparation of your briefs, upon making appropriate request and giving receipts for them.

Mr. Welch: Thank you.

The Court: If there are any difficulties with the ways in obtaining them, I will take that into account and give you an extension of time on your briefs, so that you may have an opportunity to consider the matter. [58]

Mr. Miller: That is all.

Cross-Examination

By Mr. Welch:

Q. I want to ask you, Mr. Miller, at the time you became concerned about the business, that is, the Miller Paint Company partnership, and you ultimately participated in the formation of a corporation, was it your intention or desire to continue the business operations as you had in the past?

A. Definitely, yes.

Q. You anticipated no change in your business

(Testimony of Walter Miller.)

or business methods? A. No, none.

Q. Other than the forming of the corporation?

A. Just practically the same, yes.

Mr. Welch: I have no further questions, your Honor.

Mr. Miller: That is all.

(Witness excused.)

Mr. Miller: I am going to call Mr. Moss.

H. W. MOSS

was called as a witness by and on behalf of the petitioners, and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: H. W. Moss, 15007 Southeast Oakfield Road, Portland, Oregon. [59]

Direct Examination

By Mr. Miller:

Q. Mr. Moss, what is your employment?

A. I am with the United States National Bank of Portland, Oregon.

Q. What is your capacity?

A. I am assistant trust officer and have charge of the income taxes and supervise state and gift taxes.

Q. In connection with your duties at the United States National Bank, are you familiar with the probate of the Herbert B. Miller estate?

A. Yes, I was.

(Testimony of H. W. Moss.)

Q. The United States National Bank was the executor?

A. Was executor of that estate, yes.

Q. Are you familiar with Petitioner's Exhibits Nos. 18 and 19? A. Yes.

Q. Have you ever seen those before in connection with your duties?

A. Yes, sir, I have. They were assets of the estate of Herbert B. Miller.

Q. And they came into the possession of the United States National Bank?

A. As assets of his estate.

Q. Does the United States National Bank also, as trustee, [60] presently hold 100 shares of stock in the name of the Miller Paint Company, Inc.?

A. Yes, it does.

Q. In the same trust? A. Same trust.

Q. That is, the Herbert B. Miller trust?

A. Yes, sir.

Q. That trust was set up under the last will and testament of Herbert B. Miller? A. It was.

Q. Now, do you know D. W. McKay?

A. Yes, I did.

Q. Is he alive or deceased at the present time?

A. He is deceased at the present time.

Q. What was he, with the U. S. National Bank?

A. He was a trust officer of the United States National Bank.

Q. I hand you here a photostatic copy of Exhibit No. 24 and ask you to examine the signatures that appear thereon.

(Testimony of H. W. Moss.)

A. That is the initial of D. W. McKay.

Q. Is that the way he customarily affixed his signature? A. Yes, it was.

Q. And you recognize it?

A. I recognize it.

Q. Is it true that in the year 1946 you received from the [61] corporation, Miller Paint Company, a $7,500 payment on one of these notes?

A. No. You say in the year 1946. He didn't die until 1948.

Q. That is right. I withdraw that question.

Have you received in your capacity as trustee of the estate of Herbert B. Miller any payments upon these notes?

A. We have on one of the notes, the $28,000 note.

Q. Do you recall when the first payment that you received on those was made, in the trust?

A. It was received in 1949. It was around $7,500. No. It was $6,666.66.

Q. To what account did you deposit that $6,666.66?

A. We deposited it to the principal of the trust account.

Q. Was that sum distributed to the widow?

A. No, it was not. Because it was income under the trust laws, under the rules of the trust instrument and under the laws of the state it was, remained principal.

Q. Now I hand you Petitioner's Exhibits Nos. 22 and 23 and ask you if you recognize what those are.

(Testimony of H. W. Moss.)

A. They are the 30-day letter and the 90-day letter sent to us by the Internal Revenue agent.

Q. With respect to 1949 deficiencies in income tax?

A. Yes, sir, in the amount of $1,897.17.

Q. Did you pay this deficiency? [62]

A. We did. We paid it in May of 19—I have a note of it here—it was May of 1952—yes, May 8, 1952, we paid it, plus interest.

Mr. Miller: I will offer Petitioner's Exhibits Nos. 22 and 23 in evidence.

Mr. Welch: Respondent objects to these going into evidence on the grounds that they are neither relevant nor material. They are, in fact, photostatic copies of what they purport to be, 30-day and 90-day letters issued by the Internal Revenue Agent in charge, Seattle Division, addressed to the trust of Herbert B. Miller, deceased, in Portland, and they refer to the income tax liability for the year of 1949. That is the substance of my objection on it, it has no bearing upon this case before your Honor.

The Court: I doubt that they have any probative value here.

Mr. Miller: But they do show an outline, but they do show an outline, the problems, the thing that the estate faces. And we have in here the administrator——

The Court (Interrupting): I will admit them for whatever they may be worth. My present impression is that they may be worth very little.

Mr. Miller: I think that is a fair statement.

(Testimony of H. W. Moss.)

The Clerk: Petitioner's Exhibits 22 and 23 admitted.

(Petitioner's Exhibits Nos. 22 and [63] 23 received in evidence.)

Q. (By Mr. Miller): Does the trust have either one of these exhibits in its possession right at the present time, among the assets of the trust?

The Court: What are you handing to the witness?

Mr. Miller: I am handing to the witness Petitioner's Exhibits Nos. 18 and 19, being the notes payable to Herbert B. Miller, deceased.

A. The $28,000 note has been paid off in full and returned to the Miller Paint Company, Inc. The $29,000 note has not been paid and still is held by the trust.

Q. (By Mr. Miller): Have you ever attempted to enforce payment of the Miller Paint Company, of the $29,000 note?

A. Which was due six years after date, which would make it June 1, 1952?

Q. Yes.

A. But in view of the fact that the Commissioner has contended that any payments on these notes represents a dividend, if the $29,000 note were paid, the trust account would be assessed in excess of $12,000 income tax, and also in view of the Commissioner's position, Mrs. Miller would also be subject to the same tax, on the same income, in excess of $12,000. The total of the two taxes could easily wipe out the entire note.

(Testimony of H. W. Moss.)

Q. Are you receiving interest on this note regularly?

A. We are. Five per cent per annum. [64]

Q. And I take it, from your testimony, that you consider, on the basis of good trust management, you consider it good business not to enforce the payment of that note until the tax questions are settled concerning its nature?

A. That is correct.

Mr. Miller: That is all.

Cross-Examination

By Mr. Welch:

Q. Referring to Petitioner's Exhibit No. 19 in evidence, which is the document which you just testified about, you say that none of that principal amount has been paid by the Miller Paint Company? Is that correct? A. That is right.

Q. But the interest has been paid to date?

A. Yes, up to date.

Q. In accordance with the terms of the document? A. That is correct.

Q. Have you discussed payment of this note with the management of Miller Paint Company?

A. I can't testify as to that, because I am not the man who handles the account direct. But in view of the fact that I am one of the trust officers and handle the taxes, I am familiar with the account. But obviously we do not want the note to be paid until this tax question is settled, for the reason that we would receive nothing for it. [65]

(Testimony of H. W. Moss.)

Q. Do you know, of your own knowledge, whether anyone on behalf of the trustee, has requested Miller Paint Company to make payment?

A. I do, because I checked the files recently before I came up, to be sure that no demand had been made, and——

Q. (Interrupting): To your knowledge, there has been no demand?

A. To my knowledge, no demand has been made on it.

Mr. Welch: No further questions.

(Witness excused.)

The Court: We will reconvene at 10 o'clock in the morning.

(Whereupon, at 5:05 o'clock p.m., the hearing in the above-entitled petition was adjourned until 10 o'clock a.m., Tuesday, October 12, 1954.) [66]

The Clerk: We will now resume with the Herbert B. Miller case.

BLANCHE M. MILLER

was called as a witness by and on behalf of the petitioners, and having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: Blanche M. Miller, 1700 Northeast Irving.

Direct Examination

By Mr. Miller:

Q. Mrs. Miller, are you the widow of Herbert B. Miller, deceased? A. Yes, sir.

Q. Mrs. Miller, when and under what circumstances did you first learn of the illness of Mr. Herbert B. Miller, which eventually led to his death?

A. Well, it was in 1944, in August of 1944. He became ill, had an exploratory examination, operation, and it turned out to be cancer.

Q. Did you learn that from his doctor?

A. Yes, I did.

Q. At that time did you notify any of Herbert B. Miller's relatives?

A. Yes. I immediately called his brother.

Q. And that was which brother? [67]

A. Ernest Miller.

Q. Was Herbert B. Miller under continual treatment thereafter until his death in February, 1948?

A. Yes, he was. He was under observation and treatment all the time.

Q. What type of treatment did he have?

(Testimony of Blanche M. Miller.)

A. Well, he had X-ray treatments just periodically and he was in the hospital three weeks at one time with, what as I remember as mustard gas, it was an internal X-ray treatment. He just had treatments all during that period of time.

Q. Mrs. Miller, did you have any conversations with Herbert B. Miller, your husband, concerning his estate and the assets thereof? A. Yes.

Q. About when did these conversations take place, just generally?

A. Oh, I would say—I don't remember the year. You mean the year?

Q. About, just the year about.

A. Well, one time, around the time he was making out his will, we talked about it a great deal.

Q. 1947?

A. It could have been. Yes, I would say it—that was one of the times we talked about it. We talked about it many times.

Q. In the conversations you had with Herbert B. Miller [68] concerning the assets of his estate, were the promissory notes which have been introduced in evidence here as Exhibits 15 and 16, in the amounts of $28,000, $29,000, respectively, ever mentioned? A. Oh, yes.

Q. What did he tell you about these notes?

A. Well, from what he said, I understood that the notes were to go into the estate and that I was to get the income from them, benefits, whatever income there was from them, they were to be reinvested by the trust.

(Testimony of Blanche M. Miller.)

Q. By that, do you mean that you were to receive the entire notes, Mrs. Miller?

A. No, not at all. They were to go into the trust. And I was to receive the, whatever income there was from them, derived from the trust.

Q. In these conversations did you ever understand that you were to receive the principal amount of the notes? A. No, I did not.

Q. But that you were to receive the interest?

A. That is right.

Q. And the proceeds of the reinvested income?

A. That is right.

Q. Are you positive that was his understanding?

A. Yes, I am positive.

Q. Out of any of the payments made upon the principal of [69] these notes to the Herbert B. Miller trust, have you ever received in distribution of the trust any like amounts or similar amounts?

A. Would you say that again?

Mr. Miller: I will withdraw the question and rephrase it.

Q. (By Mr. Miller): Mrs. Miller, is it not true that at the time of the formation of the trust that there was still some monies due on the principal of the notes? A. Yes.

Q. It is your understanding that the bank has received some monies on those notes, that were paid on the principal? A. Yes.

Q. Were those sums of money distributed to you as life beneficiary of the income under the will?

A. You mean the notes, the money——

(Testimony of Blanche M. Miller.)

Q. (Interrupting): The money they received on the principal? A. No.

Q. I call your attention to the year 1949 and ask you if you recognize receiving this document, a 30-day letter with respect to the deficiency of income tax for that year?

A. Yes, I remember that.

Q. And then subsequent to that did you receive Petitioner's Exhibit No. 21, a 90-day letter, making demand upon you for payment [70] of income tax? A. Yes, I did.

Q. Do you recall what the particulars were of these, or why, what was the basis of these, of this, these deficiencies?

A. Well, they were supposed to have been tax on the note that I was supposed to receive, is that it?

Q. Was it the same thing that Mr. Moss testified to yesterday, a principal payment of $6,666.66?

A. Yes.

Q. Did you receive that $6,666.66?

A. No, I did not.

Q. Did you pay these deficiencies mentioned in these exhibits? A. Yes, I did.

Mr. Miller: Again, for the purpose of showing exactly what transpired here, and in line with the judge's ruling yesterday on Exhibits Nos. 22 and 23, we ask these be admitted into evidence.

Mr. Welch: I make the same objection, your Honor, that the 30-day and 90-day notices to this taxpayer, involving the taxable year 1949, are ir-

(Testimony of Blanche M. Miller.)

relevant and immaterial, so far as the issues in this case are concerned.

The Court: I am inclined to think that they have very little, if any, relevance, but I will permit them to go in for whatever they may be worth. [71]

The Clerk: This is 20 and 21, Petitioner's Exhibits 20 and 21 admitted in evidence.

(Petitioner's Exhibits Nos. 20 and 21 were received in evidence.)

Cross-Examination

By Mr. Welch:

Q. Mrs. Miller, do you know of your own knowledge whether your husband was aware of the illness that you just testified about?

A. Well, I knew he knew he was very ill.

Q. Did he know the nature of his illness?

A. I don't know, I don't know whether he did or not. I didn't tell him.

Q. You didn't tell him? A. No, I didn't.

Q. You stated that he discussed with you the will that he was preparing?

A. Oh, yes, he did.

Q. Did you ever see the will?

A. Yes, sir.

Q. You saw it before he died?

A. I went over it many times with him.

Q. Did you ever discuss the will with his attorney? A. Yes, sir.

Mr. Welch: No further questions. [72]

(Testimony of Blanche M. Miller.)

Redirect Examination

By Mr. Miller:

Q. Did Herbert Miller and yourself have any children? A. We had one son.

Q. And his name is—— A. Herbert.

Q. With respect to whether or not you told Herbert Miller about his condition, in '44 or any time thereafter, until 1948, were you under any instructions with respect to talking about his condition, with the deceased, Herbert B. Miller?

A. What?

Q. Did the doctor ever tell you to talk or not to talk to him about it?

A. To talk to him about it?

Q. Yes. A. No, not necessarily.

Q. Did he give you any instructions either way about that? A. No.

Q. It was just a subject that was never mentioned? A. That is right.

Mr. Miller: That is all.

(Witness excused.)

Mr. Miller: With the Court's permission, I would like to recall Chester McCarthy to the stand to testify about a matter which has not been testified about before, in connection [73] with the, in particular connection with the, date of the execution of the will.

Do you have any objection?

Mr. Welch: For the limited purpose, I have no

objection. It is my understanding he will testify with respect to the last will and testament of Herbert B. Miller, which is in evidence. Is that right?

Mr. Miller: About its preparation and execution. That is, Exhibit No. 15.

Mr. Welch: There would be no objection for the limited purpose, as far as respondent is concerned.

CHESTER E. McCARTHY

was recalled as a witness by and on behalf of the petitioners, and, having been already duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Miller:

Q. Mr. McCarthy, on your previous direct examination, you testified that in the year 1946 you had conversations with Herbert B. Miller concerning the execution of his will. I hand you Exhibit No. 15, being a certified copy of the last will and testament, and call to your attention the date of the execution of that will. What date appears on that there?

A. 9 September, 1947.

Q. Is that the true date of the execution of his will? [74] A. That is.

Q. Mr. McCarthy, have you any explanation for the fact that this will was not executed until the date that it bears, in line with your previous testimony that you had conversations back in the early part of the spring of 1946?

A. Yes, I started working on Mr. Miller's will early in '46, well, not early in '46, but the middle of

(Testimony of Chester E. McCarthy.)

the year of '46, immediately upon the completion of the corporation's organization, and it was rewritten time and time again. It was one of those occasions where the rough draft was made. Herbert Miller would come into the office, have a change of mind on such items, as, oh, at what age his son should come into a portion of the trust estate, for instance, that was changed one or two times that I recall. Also a question arose of a change on what age he would get the stock of the Miller Paint Company, a couple of changes on that. He would come in and we would make another rough draft. And then there might be two or three weeks or maybe a month before he would come in again. Some of these meetings, not at first, but along towards the latter portion of that period during which this will, and the trusts therein contained were being drafted, Mrs. Miller came to the office. There were certain things that I advised him that I thought she ought to know about before his death or before the will came into being as a document, so there would be a minimum of friction between his widow, upon his death, and his [75] surviving brothers and his son, so that she would thoroughly understand what he intended to do by his tying up of the estate, in his terms, in the manner which he did in the trust. These things were all explained to Mrs. Miller in his presence, by me and by him. After the document was in a shape that it was satisfactory to him, and I thought met the legal requirements, I suggested that inasmuch as the trustee was the United States National

(Testimony of Chester E. McCarthy.)

Bank, which would be operating, or executing that portion of it, that perhaps before its execution the United States National Bank trust department ought to take a look at it and offer any suggestions they might have, that should be incorporated to facilitate the administration of the trust after it got into their hands. That was done and considerable time was taken up in that particular transaction.

If you want it, I could tell exactly——

Q. (Interrupting): Mr. McCarthy, do you keep time records?

A. In the law office, I did. I have a record here, well, all of these places where the paper clips are (indicating) were to indicate time or days upon which the Millers or some of them were in the office, in the latter part of '46, and these items in '47, many of them are in conjunction with the will of Herbert B. Miller. The last entry I have on that is on September 9, 1947, when Herbert Miller was in the office concerning his will between 2:30 in the afternoon and 4:30 in the afternoon. And that is the date the will was executed. [76]

Q. Could you tell the Court the first time that Herbert B. Miller brought up the question of his will, as noted from your time records?

A. It is possible that I can. These time records are exactly what the name implies. They are not made for the purpose of taking notes from which later to testify. They are merely records of time so that fair charges could be made for the time, and not in all of these, you never put down in detail, and not always exactly what the matter was

(Testimony of Chester E. McCarthy.)

about. For instance, a lot of these conversations were commingled with conversations concerning the Miller Paint Company business. Well, the first conversations I had with Miller Paint Company, don't think the date, this was the date which the will was brought up, April 16.

Mr. Welch: I think the witness is on here for a limited purpose, and I wish you would have him instructed that he should respond to the question. The question is, as I understand it, what was the first time that Herbert Miller came in to talk to you about making out a will, and I think his answer should be limited to that, if he knows.

The Court: Can you answer that?

The Witness: I can answer that in this way, your Honor, they were in the office on numerous occasions and I can't pinpoint any one day when he came in to talk exclusively about the will. This was all mixed up in one general transaction, in getting his estate and the estate's—— [77]

The Court (Interrupting): To the best of your recollection.

The Witness: It was early, about the middle of '46.

Q. (By Mr. Miller): I think the question was, as it would appear from the time records, what was the first time that you talked concerning the will.

A. Let's see if I have anywhere that says "will" here. Yes, the first entry I have here, where I put the notation "wills" down, is on the 19th day of

(Testimony of Chester E. McCarthy.)

June, 1946. Miller was in my office between 1:20 and 1:55 on that date. And the subject of, I have here "continued," so I must have had some conversations prior to that time concerning it, but this is the first notation I have where I have identified it as predominantly "wills," June 19, 1946.

Mr. Miller: You may cross-examine.

Mr. Welch: I have no questions, your Honor.

(Witness excused.)

Mr. Miller: Petitioner rests, your Honor.

Mr. Welch: I want to make a brief statement before the respondent rests.

In examining the stipulation of facts. I find what appears to be a typographical error. I want to demonstrate to the Court precisely what it is. It's a part of paragraph 13 of the stipulation of facts, on page 7, the fourth line, under the column in the tabulation, headed "November 30, 1946," [78] which is designated "income tax liability" there appears the figure $9,224.02. It was my intention in preparing this that this figure read $6,224.02. And that figure of $6,224.02 was taken from Exhibit I, which is a copy of a revenue agent's report, incorporated in a 30-day letter.

Mr. Miller: There is no objection to stipulating to change that.

Mr. Welch: Just so there is no conflict between the two figures.

The Court: I will hand you the original copy of the stipulation which has already been received.

You may make the change in pen and ink and both counsel will initial it at the change, in the margin.

Mr. Welch: Respondent rests, your Honor.

The Court: The petitioner's brief will be due in 45 days. Respondent may answer in 30 days. And petitioner, in turn, will have 20 days within which to reply to respondent.

I would like to have from the respondent, in his brief, a clearer statement than I have received thus far from the government as to just why these payments on the notes are said to constitute dividend income—this case has been described to me by counsel in their opening statements as a case involving two issues—which would undertake to answer that question, namely, one, whether there was a Section 112 (b) (5) change, and, secondly, whether these notes were stock rather than debt, and [79] an issue that has been described colloquially as one relating to "thin incorporation"—that is not a statutory term, it's a colloquial term. There is still a long step from either of those two issues, to the question before me, namely, whether these payments or notes constitute dividends, and I would like to see that long step spelled out with considerably greater clarity than has been presented thus far. Conceivably this might be a 112 (b) (5) change and conceivably this might be stock or notes. There is still a question that goes beyond that, as to how you convert payments on these notes into dividends, and I would like to have that spelled out with greater clarity than has been done thus far for me.

Mr. Welch: It is my intention to do that, your Honor, on brief. I am aware that there are some

unique features to the respondent's determination in this proceeding, and at the present time I think there are only two citations of authority upon which I can show your Honor——

The Court (Interrupting): I am not asking you for a citation of authority at this point. I am asking you to spell out the theory of your case. You can undertake any kind of citations you want to. But I want to see the theory of your case, as to how you convert these payments upon the principal of the notes, into dividends, into receipt of dividends.

Mr. Welch: Yes, your Honor.

The Court: I don't quite see at this point how you [80] take that step, even if you should prevail upon these two so-called preliminary or two issues you have been apparently attempting to try before me. Now, perhaps you can do it, and perhaps I have not been as alert as I should have been, but I have attentively listened to the testimony and I have examined the evidence as it has come in, and I am by no means clear as to just how you would undertake to justify that final step of treating these payments as dividend income. And I expect you in your brief to make a clear-cut analysis and show me just what the theory of your case is.

Mr. Welch: Yes, sir.

The Court: The case is submitted.

(Whereupon, at 10:35 o'clock a.m., the hearin the above-entitled petition was closed.)

Filed October 29, 1954, T.C.U.S. [81]

[Title of Tax Court and Cause.]

Certificate

I, Howard P. Locke, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 19, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review" and "Designation of Additional Portions of Record," excepting exhibits 1-A thru 7-G, H, I, 8-J, 9-K, 10-L & 11 thru 16 attached to the Stipulation of Facts and Petitioner's Exhibits 17 thru 28 admitted in evidence, which are separately certified and forwarded herewith, as the original and complete record in the proceedings before The Tax Court of the United States entitled: "Estate of Herbert B. Miller, deceased, The United States National Bank of Portland (Oregon), Administrator, d.b.n., c.t.a., Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 28582" and "Estate of Herbert B. Miller, deceased, The United States National Bank of Portland (Oregon), Administrator, d.b.n., c.t.a., Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 31062," and in which the petitioner in The Tax Court proceeding has initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States,

at Washington, in the District of Columbia, this 23rd day of January, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 15031. United States Court of Appeals for the Ninth Circuit. Estate of Herbert B. Miller, Deceased, United States National Bank of Portland, (Oregon), Administrator, d.b.n., c.t.a., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed February 9, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 15031

Estate of HERBERT B. MILLER, Deceased, THE UNITED STATES NATIONAL BANK OF PORTLAND, (Oregon), Administrator, d.b.n., c.t.a.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR CONSOLIDATION ON APPEAL

Comes Now the Estate of Herbert B. Miller, Deceased, The United States National Bank of Portland, (Oregon), Administrator, d.b.n., c.t.a., petitioner, and moves that the proceedings in Tax Court Docket Nos. 28582 and 31063, both captioned as above, be consolidated for the purpose of printing of record, briefing, hearing, argument and decision and for cause therefor, respectfully represent to the Court as follows:

1. The issues of fact and of law in each of the above-mentioned Tax Court Docket Nos. 28582 and 31063 are identical.

2. The proceedings in each of said docket numbers were consolidated before the Tax Court for trial, briefing and decision.

Wherefore, it is prayed that this motion be granted.

/s/ GEORGE W. MILLER,
Attorney for Petitioner.

Consented to:

/s/ CHARLES K. RICE,
Acting Assistant Attorney General, Attorney for Respondent.

So ordered:

/s/ WILLIAM DENMAN,
Chief Judge;

/s/ WM. HEALY,

/s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed February 20, 1956, U.S.C.A.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD

Comes Now the Petitioner on Review and for its Statement of Points on Appeal, designates and adopts the Statement of Points as filed in Docket Nos. 28582 and 31063 in the Tax Court of the United States and as certified to by the Clerk of the Tax Court and heretofore filed with the above-entitled Court; and

Petitioner on Review does hereby designate as the Record on Review the Designation of Contents of Record on Review filed by Petitioner on Review and the Designation of Additional Portions of Record filed by Respondent on Review in Docket Nos. 28582 and 31063 in the Tax Court of the United States and as certified to by the Clerk of the Tax Court and heretofore filed in the above-entitled Court; and

Petitioner on Review relies upon all exhibits and the pleadings in Docket No. 31063, herein designated, in their original form whether or not printed in the Transcript of Record in the above-entitled Court.

Dated this 10th day of February, 1956.

McCARTY, SWINDELLS,
MILLER & McLAUGHLIN,

DAVID S. PATTULLO,

GEORGE W. MILLER,

/s/ GEORGE W. MILLER,
Of Attorneys for Petitioner
on Review.

Service of copy acknowledged.

[Endorsed]: Filed February 21, 1956, U.S.C.A.

[Title of Court of Appeals and Cause.]

STIPULATION RE PRINTING OF RECORD

It Is Hereby Stipulated between the Commissioner of Internal Revenue, Respondent on Review, by his attorney, Charles K. Rice, Acting Assistant Attorney General, and the Estate of Herbert B. Miller, Deceased, The United States National Bank of Portland, (Oregon), Administrator, d.b.n., c.t.a., Petitioner on Review, by George W. Miller, its attorney, subject to the discretion of the above-entitled Court:

1. That the Clerk of the above-entitled Court may include in the printed Transcript of Record only the pleadings designated by the parties in Tax Court Docket No. 28582 and may exclude the pleadings in Tax Court Docket No. 31063, it being recognized that the pleadings in each of said docket numbers are substantially identical.

2. That any decision on appeal in the above-entitled Court, based upon the pleadings in Tax Court Docket No. 28582 shall be determinative in the proceedings relative to Tax Court Docket No. 31063 in the same manner as if the pleadings therein were printed in the Transcript of Record.

3. That all exhibits designated by the parties as part of the Record on Appeal, although relied upon by the parties in their original form, need not be printed in the Transcript of Record.

Dated this 10th day of February, 1956.

/s/ CHARLES K. RICE,
Acting Assistant Attorney General, Attorney for Respondent.

/s/ GEORGE W. MILLER,
Of Attorneys for Petitioner on Review.

[Endorsed]: Filed February 21, 1956, U.S.C.A.

NO. 15031

United States
COURT OF APPEALS
for the Ninth Circuit

Estate of HERBERT B. MILLER, Deceased, UNITED STATES NATIONAL BANK OF PORTLAND, (Oregon), Administrator, d.b.n., c.t.a.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF

Petitions to Review the Decisions of the Tax Court of the United States.

McCarty, Swindells, Miller & McLaughlin,
David S. Pattullo,
William Miller,
Portland 4, Oregon,
For Petitioner.

Charles K. Rice,
Acting Asst. Attorney General;
Lee A. Jackson,
Tax Division, Dept. of Justice,
Washington 25, D. C.,
For Respondent.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-56

SUBJECT INDEX

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NO. 15031

United States
COURT OF APPEALS
for the Ninth Circuit

Estate of HERBERT B. MILLER, Deceased, UNITED STATES NATIONAL BANK OF PORTLAND, (Oregon), Administrator, d.b.n., c.t.a.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF

Petitions to Review the Decisions of the Tax Court of the United States.

STATEMENT OF JURISDICTION

The Petitions for Review of the Decisions of the Tax Court of the United States in Docket Nos. 28582 and 31063 by the United States Court of Appeals for the Ninth Circuit were filed pursuant to Sec. 7482 and Sec. 7483, Internal Revenue Code of 1954 (Tr. 59, 60).

STATEMENT OF THE CASE

Herbert B. Miller, the decedent, died on February 13, 1948, a resident of Milwaukie, Oregon (Tr. 23).

Prior to June 1, 1946, decedent and his two brothers, Ernest Miller, Jr. and Walter M. Miller, were equal partners in a paint manufacturing and marketing business in Portland, Oregon, doing business as Miller Paint Co. The assets of the firm consisted of personal property, accounts receivable and cash. The real estate occupied by the firm was rented from Miller Paint and Wall Paper Co. another co-partnership composed of the same three persons (Tr. 25).

Blanche M. Miller is the widow of decedent. Some time in 1944 she was informed by a physician that her husband, Herbert, had cancer and could live only a few years longer. Ernest and Walter were informed of this but none of them told the decedent and it is not apparent whether he ever became aware of his condition (Ex. 12, Tr. 125, 130).

Ernest and Walter Miller were aware of his illness and realized the importance of taking steps to preserve the continuity of the business to provide an estate for Herbert B. Miller, independent of the Herbert B. Miller Company co-partnership for the benefit of Herbert Miller's widow and son, and to avoid complications in the probate of their brother's estate (Tr. 106, 112).

Decedent was the only partner with children (Ex. 15). Ernest was married, but had no children; Walter was unmarried.

In late 1945, the partners conferred with trust officers of the United States National Bank to the best method of accomplishing the end sought and were advised to have purchase provisions incorporated in a partnership agreement with wills containing trusts (Tr. 103, Ex. 24).

Independent counsel, however, was also consulted and this counsel in turn consulted tax counsel as to the tax effect of the proposed transaction as hereinafter related as the plan developed (Tr. 82, 98, 99).

The three brothers desired an arrangement whereby death or incapacity of a partner would not affect the continuity of the business; that the business could carry on free from interference in case of possible complications in the eventual probate of a partner's estate (Tr. 82) and an estate could be created, independent of the partner's interest in Miller Paint Co., for the benefit of the decedent's family in case of his death (Tr. 83). In addition, Ernest Miller desired to incorporate the Miller Paint Co. business so that he could leave his share of the business to some of his old employees (Tr. 107), without disturbing the continuity of management (Tr. 83).

Upon advice of counsel, the Miller brothers were advised that a corporate organization (Tr. 83) would best preserve the continuity of the business (Tr. 83), would avoid complication of the probate of any estate of any of the partners, would allow greater flexibility in the eventual disposal of interest in the Miller Paint Co. to its employees, and would allow each of the brothers to create an estate in themselves and for the benefit of

those to whom they wished to dispose of their property, substantially equal to the value of their share in the physical assets of the partnership (Tr. 82, 83, 111, 112, 126).

In the years immediately prior to June 1, 1946, earnings had been high (Tr. 112, Ex. 10-L). No evidence was presented suggesting any doubts at that time that the prosperous condition of the business would continue.

In accordance with the plan to incorporate the business, Miller Paint Co., Inc. was organized pursuant to laws of the State of Oregon on or about May 13, 1946. The charter was received on May 18, 1946. Total authorized capital stock consisted of three hundred shares of no par stock. Each partner subscribed for one hundred shares at a stated value of $3.50 per share. The shares were issued on May 20, 1946 (Tr. 27, Ex. 9-K). Oregon law requires that a corporation with no par stock have a capital investment of at least $1,000.00 (Tr. 71). Each party paid for the stock subscribed for, in cash, from his respective personal bank account (Tr. 7, Ex. 9-K).

The new corporation acquired a large portion of the assets of the partnership. It succeeded to the paint selling and manufacturing business and obtained its good will. All of the tangible assets, including inventory, equipment and fixtures of the partnership were acquired. The agreed fair market value of the physical assets acquired on June 1, 1946, was as follows:

	Fair Market Value June 1, 1946
Inventory	$60,122.49
Machinery and Equipment	15,000.00
Furniture and Fixtures	3,000.00
Delivery Equipment	7,500.00
Office Equipment	1,000.00
Total	$86,622.49

The adjusted basis of the same assets in the partnership as of May 31, 1946, was lower, to-wit, $73,255.-14 (Tr. 27, 28).

The corporation also acquired from the partnership its accounts receivable, petty cash and change fund, and some unearned insurance premiums and assumed certain trade accounts payable of the partnership, as follows (Tr. 28):

Petty Cash and Change Fund	$ 598.00
Accounts Receivable	89,328.54
Unexpired Insurance	636.40
Total	$90,562.94
Less: Accounts Payable	52,614.17
Balance	$37,948.77

During the first meeting of the Board of Directors, held on May 20, 1946, it was resolved that the corporation borrow $50,000.00 from Ernest Miller, Jr., H. B. Miller and Walter Miller at an interest rate of five per cent per annum and that the corporation execute a promissory note in the usual form as evidence of such indebtedness and payable on or before three years after date (Ex. 25), which note dated June 1, 1946, was issued (Ex. 17).

At another meeting held on June 3, 1946, it was resolved that the corporation purchase from the partners, at inventory value, all of the partnership's machinery, equipment, store fixtures, automotive equipment and stock of goods, wares and merchandise as per close of business as of May 31, 1946, the corporation agreeing to pay the inventory price or fair market value thereof and that the corporation execute and issue a promissory note to the three partners payable at the rate of $20,000.00 per year, plus interest at the rate of five per cent per annum on the unpaid balance, the first of said payments to be made on or before June 1, 1947 (Ex. 25).

At the same meeting (Ex. 25) it was determined that the fair market value of the goods, wares, merchandise, furniture, fixtures, machinery and equipment being purchased by the corporation, was $86,622.49 (Tr. 28). This purchase was evidenced by a promissory note in the same amount issued by the corporation payable to all three former partners (Ex. 17).

Another resolution, at the same meeting (Ex. 25) called for the purchase, by the corporation, of certain intangible assets of the firm subject to liability. The fair market value thereof was $37,948.77 and a note in that amount was issued payable to all three partners on or before six years after date, plus interest on any unpaid balance at the rate of five per cent per annum from the date of the note, interest payable annually (Ex. 17).

At the same meeting (Ex. 25) the Directors further resolved that the corporation execute and deliver a

chattel mortgage encumbering the corporation's personal porperty as security for the payment of the two aforementioned notes of $86,622.49 and $37,948.77 (Ex. 25). This mortgage was executed and delivered (Ex. 13).

Accordingly, in the final return of Miller Paint Co., a co-partnership, the partnership reported a net gain on its fixed assets sold to the corporation, the net gain being the difference between the depreciated or adjusted value thereof and the fair market value at the time of sale (Ex. 1-A). This gain in the amount of $6,683.68 was proportionately reflected and reported as a long term capital gain upon the partners' individual income tax returns (Ex. 2-B).

The transaction also resulted in recovery for bad debts in the partnership which was reported by the partnership in the final partnership return as a short term gain in the amount of $5,268.81 which, in turn, was reported as income upon the partners' individual income tax returns (Ex. 1-A, 2-B). The Commissioner, however, upon audit, treated the recovery as ordinary income (Ex. 8).

At a subsequent meeting of the Board of Directors on June 31, 1946, it was resolved to reissue the notes of the corporation wherein all three of the Miller brothers were named as payees for notes and which each individual would hold notes for one-third of the previous notes (Ex. 25). Accordingly, and in lieu of the note in the amount of $37,948.77 and the note of $50,000.00 payable to the partners jointly, separate notes were issued in the sum of $29,316.26 payable to each of the partners

six years from date and bearing interest at five per cent payable annually (Ex. 19).

At the same time and in lieu of the original note payable to the three partners in the sum of $86,622.49, three separate notes in the amount of $28,874.16 were issued payable to the individual partners in annual installment of not less than $6,666.68 together with interest at the rate of five per cent (Ex. 18).

It was further resolved that the chattel mortgage previously issued stand as security for the payments of these notes (Ex. 25).

The books of the partners (Ex. 26) and of the corporation (Ex. 27, 28) reflected the foregoing transactions. Upon dissolution of the partnership, the partnership had on hand $98,720.15 in cash which was owned equally by the partners (Ex. 1-A).

Between January 1st and May 1st, 1946, gross receipts of Miller Paint Co. co-partnership were $329,-528.09 (Ex. 1-A). The corporation had gross receipts of $403,809.06 between June 1st and November 30, 1946 (Ex. 4-D). During the fiscal year ending November 30, 1947, gross sales totaled $864,540.75 (Ex. 5-E).

No dividend has ever been declared by the corporation (Tr. 109).

In 1946 and 1947, decedent received from the corporation, as payments upon the principal of the note for the $28,874.16, the sums of $7,500.00 and $10,000.00 from Miller Paint Co., Inc. Equal amounts were paid to Walter M. Miller and Ernest Miller, Jr. The item of

"notes payable" on the balance sheet of the corporation of $174,571.26 was reduced in amounts comparable to the foregoing payments of the respective shareholders (Tr. 27, 28).

It is these payments that are at issue, the Commissioner contending that the payment of these amounts constitute a taxable dividend to the decedent to the extent of the available earnings of the corporation.

Herbert B. Miller died from cancer on February 13, 1948 (Ex. 12), leaving a Last Will and Testament (Ex. 15) which provided, generally, that his entire estate, including the notes and stock in Miller Paint Co., Inc. would be placed in trust with the United States National Bank of Portland (Oregon) and that the net annual income of the trust estate be paid in monthly installments to his widow, Blanche M. Miller, during her life. In the event of the widow's death, the son not having reached the age of thirty years, one-half of the estate in cash or kind or both was to be distributed to testator's son and the remaining half is distributable to him when he attained the age of thirty years. However, the widow, has, under the will, the right to accelerate the distribution of the Miller Paint Co., Inc. stock to her son. This right to accelerate the vesting of stock in the son applies only to the stock and has no application to the remainder of the trust estate including the notes in question (Ex. 15).

The Executor of the decedent's estate included in the Inventory and Appraisement filed in the Circut Court of the State of Oregon, County of Multnomah,

Department of Probate, Clerk's No. 59444 (Ex. 14) and in its Federal Estate Tax Return on Schedule C, Page 2, Item VII and VIII (Ex. 6-F), as an asset of the estate, the promissory notes issued to the decedent. The principal balance due on the note in the face value of $28,-874.16 was the sum of $11,374.16 and the other $29,319.-26. Federal Estate Tax was paid on these values.

The Executor further included, in the Inventory and Appraisement and in the Federal Estate Tax Return of the decedent at Schedule D, Page 2, as an asset of the estate, one hundred shares of Miller Paint Co., Inc. capital stock, no par value, at $347.78 a share (Ex. 14, 6-F), which value was predicated entirely on the average earnings of the partnership and the corporation projected over a period of ten years with an allowance for management and capitalized at the rate of twenty per cent (Tr. 30, Ex. 10-L).

The formula would be as follows:

$$\frac{\text{Average Net Income} \times 5}{300 \text{ Shares}} = \text{Fair Market Value of 1 Share}$$

$$\frac{\$20{,}866.76 \times 5}{300} = \$347.78$$

Under the foregoing statement of facts, this case involves the following questions:

(1) Did payments made by Miller Paint Co., Inc. to Herbert B. Miller, upon the principal of a promissory note held by the taxpayer constitute dividend income to the taxpayer.

(2) Was the transaction which transferred the assets of Miller Co., a co-partnership to Miller Paint Co., a tax free exchange within the meaning of Sec. 112 (b)(5) Internal Revenue Code, 1939.

SPECIFICATION OF ERRORS

1. The Tax Court erred in holding that a deficiency exists with respect to the deceased, Herbert B. Miller's personal income taxes for the taxable years ending December 31, 1946, and December 31, 1947, when in truth and in fact there was no deficiency.

2. The Tax Court erred in holding that payments made upon the principal of promissory notes held by the deceased and issued by Miller Paint Co. constituted taxable dividends within Sec. 115(a) of the Internal Revenue Code, 1939, to the extent of the available earnings and profits of the corporation when in fact said payments constituted a return of capital.

3. The Tax Court erred in holding that the sale of various assets of a predecessor corporation at market value to Miller Paint Co., Inc., together with a contemporaneous loan of cash and the issuance by the corporation of notes payable to the decedent partner in payment thereof was a transfer of assets "solely in exchange for stock or securities" within the non-recognition of gain or loss provisions of 112(b)(5) of the Internal Revenue Code of 1939.

4. The Tax Court erred in holding:

(a) The sum represented by the declared value of the capital stock of Miller Paint Co., Inc. was grossly inadequate to operate business;

(b) The lowest stated value of the capital stock was a fiction.

(c) The risk capital actually contributed to the corportation was represented by the operating assets and cash of partnership;

(d) No bonafide indebtedness was created by the notes issued by the corporation to the decedent partner; and

(e) The true consideration for the cash and operating assets was the capital stock issued to the decedent partner;

When in fact:

(a) Miller Paint Co., Inc. was adequately capitalized;

(b) The consideration for the capital stock was the sum of $1,050.00;

(c) The risk capital actually contributed to the corporation was represented by the capital stock alone;

(d) A bonafide indebtedness providing temporary financing for the corporation was created by the notes issued by the corporation to the partners.

(e) The true consideration for the cash and operating assets of the partnership was represented by the notes issued to the partners.

5. The Tax Court erred in finding that there was no bonafide intention to affect a true debtor-creditor relationship and that they intended to be investors in the corporate business to the full extent of all value contributed by them, when in fact, the taxpayer intended to create a debtor-creditor relationship between himself and the corporation and to extract from the business the capital that he had invested therein.

6. The Tax Court erred in holding that the substance of the business transaction at issue was not identical to its form when in truth and in fact the substance of the business transaction was identical to its form.

7. The Tax Court erred in holding that the form adopted by the taxpayer partners in capitalization and financing of the corporation had no business purpose, when in truth and in fact there was a business purpose.

8. The Tax Court erred in holding that the notes are a mere sham and have no reality when in fact the notes were impeccable in form and were consistently treated as representing indebtedness owned by the corporation to the decedent taxpayer.

9. The Court erred in determining that as a matter of law, the payments made by Miller Paint Co., Inc. to Herbert B. Miller, upon the principal of a promissory note held by the taxpayer constituted dividend income to the taxpayer when, as a matter of law, said payments constituted return of principal.

The Tax Court erred in determining, as a matter of law, that the transaction at issue constituted a tax free

exchange of partnership assets for stock in the corporation within Sec. 112(b)(5) I.R.C. 1939, when as a matter of law, there was a sale of assets for notes.

SUMMARY OF ARGUMENT

The form of the notes and of the corporation of Miller Paint Co. gave clear evidence that the notes are evidence of indebtedness. They are impeccable in form, are short-term, have a definite maturity date and not subordinated to the claims of the corporation's general creditors.

The intent of the participants in the transaction was to create an indebtedness rather than a permanent capital investment. As evidencing this intent, taxpayer, had a business purpose in financing the Miller Paint Co., Inc. by using indebtedness instead of capital stock, as he desired that the capital that he was loaning to the corporation be returned to his estate and did not desire that the return of this capital either to himself or his estate to be subject to income taxes. The intent of the taxpayer was evidenced by his consistent treatment of the notes as evidence of indebtedness both by the prompt payment of the same in accordance with their terms, the inventory of the notes as a separate item in his estate and their inclusion in his Federal Estate Tax return. The corporation was not thinly capitalized, as there was additional consideration transferred to the corporation, represented by notes consisting of good will and the right to receive high earnings in the coming years.

The Tax Court's finding that the notes were sham is essentially a charge of fraud which is not supported by the pleadings or evidence.

The finding of the Court that the sale by the partnership to the corporation of the partnership assets was a nontaxable transfer contradicts the express provisions of the Internal Revenue Code with respect to nonrecognition of gain or loss and was contrary to the intent of the parties.

No matter what the conclusion of the Court may be as to whether the notes are sham, the facts indicate that payments on the principal of the notes are a return of capital which is neither a dividend nor essentially equivalent to a dividend within the meaning of the Internal Revenue Code.

ARGUMENT

Point 1

The form of the notes and of the incorporation of Miller Paint Co., Inc., gives clear evidence that the notes are evidence of indebtedness.

No evidence was offered by the Commissioner to controvert or cast doubt upon the bona fide character of the notes issued by the corporation to the taxpayer.

This was recognized by the Tax Court where in its opinion (Tr. 42) the Court said:

> "The form of the notes in the instant case presents no such problem. These notes standing by themselves, are clear evidence of indebtedness."

In fact, the evidence in the case is replete with facts testifying to the impeccable form of this transaction.

(a) All of the capital stock issued by the corporation was paid for in cash by the taxpayer and his brothers by checks drawn upon their personal, as distinguished from their partnership, bank accounts (Tr. 27).

(b) The minute book of the corporation which records the entire transaction gives evidence of a sale by the partners to the corporation and the creation of a debtor-creditor relationship with respect for the payment for these partnership assets (Ex. 25).

(c) The physical assets of the partnership were revalued at their fair market value for the purpose of sale (Ex. 25) and the gain was recorded on the books of the partnership (Ex. 26) and reflected in the individual tax returns of the taxpayer (Ex. 2-B) and his brothers. The opening entries on the books of the corporation reflect the existence of "Notes Payable Officers", "Interest Expense", "Capital Stock" and the stepped-up value of the physical assets acquired from the partnership by the purchase (Ex. 27).

(d) The indebtedness of the corporation created by the purchase of the current and fixed assets of the partnership and the $50,000.00 cash loan was secured by a chattel mortgage in favor of the former partners (Ex. 13). There was no subordination of the indebtedness to the general creditors. In fact, the converse was true.

(e) The interest and principal on the notes were payable unconditionally, whether earned or not and

were not payable only at the discretion of the Board of Directors (Ex. 18, 19, 25).

(f) The notes were short form and had fixed maturity dates (Ex. 18-19).

The fact that the principal of the loans was secured by a chattel mortgage and was not, therefore, subordinated to the claims of other creditors, is evidence that a debtor-creditor relationship was created. *B.M.C. Manufacturing Corporation,* 11 TCM 376, *cf. Anderson Corp.,* 5 TCM 392 (1946) where the Commissioner was unsuccessful in attempting to treat indebtedness secured by a first mortgage on real estate as stock.

In *Comm. v. O.P.P. Holding Corp.,* 76 Fed. (2d) 11 (CA 2, 1935), Judge Swan said:

> "We do not think it fatal to the debenture-holder's status as a creditor that his claim is subordinated to those of general creditors. The fact that ultimately he must be paid a definite sum at a fxied time marks his relationship to the corporation as that of creditor rather than shareholder. The final criterion between creditor and shareholder we believe to be the contingency of payment."

The above is quoted in *Comm. v. Page Oil Co.,* 129 Fed (2d) 748, (CA 2-1942). See also *The Bowersook Mills & Power Company v. Comm.,* 172 Fed (2d) 904 (CA 10-1949) and *John Kelly & Company v. Comm.,* 326 U.S. 521 (1946).

As opposed to a stockholder relationship, the most significant, if not the essential feature of a debtor-creditor relationship, is the existence of a fixed maturity date of the obligation with the right to enforce payment:

Wilshire & Western Sandwiches, Inc., 175 F(2d) 718 (1949); *Bonds, Inc.*, TC Memo Op. Dk. 5074 (N. 1944); *Jordan Co. vs. Allen*, 85 Fed. Supp. 437 (D.C.N.D., Ga., 1949); *Universal Oil Products Co. vs. Campbell*, 181 F(2d) 451 (CCA 7th, 1950), *aff'd. on this point*: 40 A.F. T.R. 1328 (D.C.N.D.) Ill. 1949; *Commissioner vs. Schmoll Fils Associated, Inc.*, 110 F(2d) 611 (CA 2d 1940); *U. S. vs. South Georgia Ry. Co.*, 107 F(2d) 3 (CA 5th 1939); *Idaho Dept. Store, Inc.*, TC Memo Op. Dk. 923 (1944).

While consitency and nomenclature are not controlling, they have some evidenciary value, and in absence of other proof, they raise a presumption as to the nature of the investment. *Pierce Estates, Inc.*, 16 TC 1020; *Estate Planning Corp. vs. Commissioner*, 101 F(2d) 15 (CCA 2d, 1939); *Alma de B. Spreckles*, 8 TCM 113 (1949).

Indeed, as a matter of form, what more could the taxpayer have done to legally create an "indebtedness" as distinguished from a "permanent capital investment in stock?"

Point 2

All evidence indicates the intent of the participants in the transaction was to create an indebtedness rather than a permanent capital investment.

With respect to whether a debtor-creditor relationship exists, the intent of the parties as to the nature of the transaction controls: *Wilshire & Western Sandwiches, Inc.*, 175 F(2d) 718, (CA-9, 1949); *Elliott-Lewis*

Corp. Co., Inc., TC Memo Op. Dk. 3275 (1949) aff'd. 154 F(2d) 292 (CCA 3d, 1946); *Harvey Investment Co. vs. Scofield,* U.S. Dist. Ct. W.D. Texas 45 A.F.T.R. 899, (1953); *1432 Broadway Corp.,* 4 TC 1158 (1945), aff'd. per curiam, 160 F. 2d 885 (CCA 2d, 1947); *Kipsborough Realty Corp.,* 10 TCM 932 (1951).

The elements of a debtor-creditor relationship are a meeting of the minds as to the intent of the nature of the events; transfer of the consideration, and a promise to pay, evidenced by negotiable promissory notes presenting an unconditional and legally enforcible obligation for the payment of money. *Wilshire & Western Sandwiches, Inc.,* 175 F(2d) 718 (1949).

(a) The taxpayer had a business purpose in financing the Miller Paint Co., Inc. by using indebtedness instead of capital stock.

The decedent, Herbert B. Miller, had a wife and minor child for whom he had to provide support. Although it is not known whether or not he knew that he had cancer, he did know that he was sick and should get his estate in order (Tr. 130).

The decedent, in 1946, had substantially all of his assets tied up in the Miller Paint Co., a co-partnership consisting of himself and his brothers. The continuity of the business in the event of his death was the concern of all of the partners including the decedent (Tr. 82, 83, 102, 112, 40).

All of the evidence leads to the conclusions that the business purpose of the taxpayer was to:

(1) Simplify the administration of the estate of a deceased partner;

(2) To insure the continuity of the business in the event of the death of one of the partners; and

(3) To create in the estate of decedent partner, and particularly of the taxpayer, who had a widow and minor child to think of, a fixed obligation on the part of the corporation to pay the partners the value of the assets that they had sold to the corporation and so provide the partner and his estate with assured income for a period of years, a liquid and enlarged estate, and an extraction from the paint business of the monies and assets upon which the partner had already paid income taxes.

If taxpayer, as the United States National Bank had suggested, had executed a buy and sell agreement between himself and his brothers, taxpayer could not reasonably have been expected to receive full value for the good will of the business which was expected to increase in value considerably in the next few years. It would not be reasonable for taxpayer to execute such an agreement, as this might, in all probability, foreclose any possibility of his son having a place in the firm.

From taxpayer's point of view, the only feasible method to accomplish his desires was to incorporate and once this decision was made, he was faced with the problem as to how to assure an adequate estate, the income from which would provide for his wife and child.

He could have no assurance that the corporation would ever pay a dividend. As a matter of fact, the evi-

dence shows that no dividend has ever been paid by Miller Paint Co., Inc. Under these circumstances, the only feasible method of being assured that his capital interest in the partnership would be repaid to his estate was to create an indebtedness from the corporation to himself and to his estate by the use of notes.

After the original intention was formed to create a corporation, the tax effects of the contemplated method of financing and organizing a corporation were examined (Tr. 38, 39).

In determining whether payments made in debentures issued for exchange of capital stock would be treated as interest or dividends, the Courts have held that the business purpose test is not determinative and the stockholders have a right to change or create a debtor-creditor relationship, though the reason may be purely personal to the parties concerned. *Toledo Blade Co.,* 11 TC 1079; *affirmed on other grounds* 182 F(2d) 357 (CA 6th, 1950). Other cases of similar import are: *Clyde Bacon, Inc.,* 4 TC 1170 (1945); *Cleveland Adolph Mayer Corp.,* 6 TC 730 (1946); *Stirn, Inc.,* 107 Fed. (2d) 390 (CCA 2d, 1937); *Lloyd Smith,* 116 F(2d) 642 (1941); *Pinella Ice and Cold Storage Co. vs. Commissioner,* 53 S. Ct. 257, 287 U.S. 462 (1933).

Later, in *New England Lime Co., Inc.,* 13 TC 799 (1949), the Tax Court held that the presence of a business purpose other than the saving of taxes (in changing from stocks to debentures) was a factor favorable to debt recognition. Again in *H. E. Fletcher Co., Inc.,* 10 TCM 1025 (1951) involving a conversion of preferred stock to notes, the Court said:

> "Unless tax saving is the sole purpose there is nothing to prevent a taxpayer from exchanging an instrument of proprietorship to one of indebtedness."

In *Ruspyn Corporation,* 18 TC 135 (1951) (*Comm. Acq., Int. Rev. Bull. 1952-24*) involving the incorporation of partnership real property in exchange for stock and debt, the Court included in its enumeration of factors favorable to debt recognition, the presence of a "good business reason for the issuance of debt securities and found the reason for incorporating the desire on the part of the incorporators to bring about a unity of title the better to deal with tenants. The Court went on to state:

> "We feel perfectly sure from the facts which have been stipulated and from the oral testimony that when petitioner was organized and it issued 6000 shares of common stock with par value $100, and $2,100,000 face value debentures in payment of real estate which it acquired from the owners, it fully expected to be able to pay the interest on its debenitures and to have something substantial left over for distribution to stockholders as dividends on its common stock. Therefore the fact that events which happened after the widespread depression made it impossible for petitioner to collect the rents which it had anticipated does not throw any shadow on the bonafide of its stock and debenture issues."

We finally come, however, to *Kraft Foods Co. vs. Commissioner,* 21 TC 513 Revsd. — F(2d) — (CA-2 1956).

In this case, the taxpayer, a subsidiary corporation, declared a $30,000,000.00 dividend to its parent corporation and cast the dividend in the form of debentures payable to the parent company bearing interest.

The Commissioner contended that the debenture issue should be disregarded for tax purposes because it served no business purpose other that the minimization of taxes, i.e. the deduction by a taxpayer of interest upon debentures as a business expense. The Court posed the following question:

> "Assuming, then, that the purpose of the transaction was to minimize taxes, should the transaction be disregarded because of its tax motivation?
>
> "The Commissioner argues that transactions, though formally perfect that in compliance with the provision of the tax statute, must be disregarded if they have no purpose germane to the conduct of the business other than tax minimization. He relies on *Gregory vs. Helvering,* 1935, 239 U.S. 465 (14 AFTA 1191); *Minnesota Tea Co. v. Helvering,* 1938, 302 U.S. 609 (19 AFTR 1258); *Griffiths vs. Commissioner,* 1939, 308 U.S. 355 (23 AFTR 784); *Higgins v. Smith,* 1941, 308 U.S. 473 (23 AFTR 800); *Commissioner v. Court Holding Co.,* 1945, 324 U.S. 331 (33 AFTR 593); *Bazley v. Commissioner,* 1947, 331 U.S. 737 (35 AFTR 1190); *Commissioner v. Culbertson,* 1949, 337 U.S. 733 (37 AFTR 1391).
> "We do not think that these cases hold that tax minimization is an improper objective of corporate management; they hold that transactions, even though real, may be disregarded if they are a sham or masquerade or if they take place between taxable entities which have no real existence. The inquiry is not what the purpose of the taxpayer is, but whether what is claimed to be, is in fact. As Judge Learned Hand in *Loewi v. Ryan,* 2 Cir., 1956, — F.2d —, —, '* * * the Act is to be interpreted against its own background, and in deciding how far it adopted all legal transactions that the state law may have covered, it was proper to exclude those that had no other result than to evade taxation. The purpose of the Act was to exempt from tax only

such legal transactions as arose out of an enterprise or venture that had some other authentic object of its own, and were neither alien and hostile to the raising of revenue, nor designed to effect no change in legal interests except to defeat a tax.' . . ."

"The parties, each having a separate and real corporate personality, engaged in certain objective acts with the intent of creating legal rights and duties. We think that the occurrence of these acts affected their legal relations. Since the acts were real and the taxable entities cannot be characterized as sham entities, the transaction should not be disregarded merely because the transaction was entered into in response to a change in the governing tax law."

It is interesting to note that substantial tax savings of the decedent taxpayer did not prove out in operation. When, after taxpayer's death, the true value of the Miller Paint Co., Inc. stock was determined for tax purposes and decedent's stock therein was appraised at $34,778, to which was added the appraised value of the balance then due upon the notes, in the total sum of $40,690.42 and Federal Estate Tax paid thereon, the inclusion of the notes in the gross estate of the taxpayer substantially increased the Federal Estate Taxes payable by taxpayer's estate (Ex. 6-f, 7-g).

The Tax Court found (Tr. 40):

"No business reason dictated the formal method of capitalization undertaken."

and in its opinion, made the following statements in support of its position:

"* * * and we find no business purpose other than hope for avoidance of taxes, necessitating a

predominant debt structure and capital stock of a nominal declared value." (Tr. 49)

"The record in the instant proceeding satisfies us that there was no valid business purpose which dictated the gross undercapitalization here present. There seems to be no question that sound reasons existed for forming a corporation to carry on the business, which had been operating up to that time as a copartnership, but every advantage sought through incorporation, except that of the avoidance of taxes, could have been accomplished with equal facility and assurance of success by the more normal method of the issuance of capital stock of a par or declared value more nearly commensurate with the total amount permanently contributed to the corporation, and with which it was expected thereafter to conduct its affairs. * * *" (Tr. 52, 53)

"It may be quite true that the discovery of cancer in the decedent motivated the formation of the corporation so as to provide for continuity of the business in the event of death of one of the three brothers or in other circumstances. There was thus adequate business reason for incorporating the enterprise. But there was no business reason apparent on this record that called for such an absurdly low capitalization as petitioner asks us to accept at face. The argument that there was a business reason for incorporating the enterprise is merely a smoke screen that may be calculated to hide the absence of any business reason for attempting to achieve the result in the form that was employed." (Tr. 53, 54)

The Tax Court's ultimate conclusion of fact that there was no business purpose in the issuance of the notes is contradicted in its own opinion which holds:

(1) Incorporation of the partnership was motivated the a sound business purpose.

(2) The taxpayer was motivated by tax avoidance in using indebtedness rather than capital investment in stock to finance the company.

The opinion recognizes that the incorporation of the company was not a "sham." It disregards completely taxpayer's desire to remove his accumulated capital upon which he had paid income taxes from the business and his desire to create a fixed obligation of the corporation to repay to him or his estate, the capital loan to the corporation for its temporary use.

The opinion suggests that substantial investments in capital stock would have accomplished taxpayer's purpose. No explanation, however, is given as to how the same results could have been obtained by the use of stock as compared to that of notes.

What is more important, no suggestion is made by the opinion as to how a proposed issue of stock could be redeemed without making the redemption essentially equivalent to a dividend and so build into the corporation financing a confiscatory tax program which would destroy the value of the stock redeemed.

If it is assumed that, as the Tax Court holds, that tax avoidance is not a sufficient business purpose in formalizing the financing of the corporation by debt, the Tax Court then, at the same time, makes an implied assumption that taxpayers, generally, in conducting their business, have a "business purpose" to increase their taxes—a thesis rather hard to support in light of current business practices and high tax rates. As a matter of fact, a minimization of taxes is the principal con-

cern of every business in the United States today. The capitalist and the wage earner, whether at a lawyer's office or at the collective bargaining table continually ask the question, "What will I have after taxes."

If the Tax Court had found that it is good business for the taxpayer to cast his business transactions in a form that would increase his taxes, then petitioner could understand the holding of the Tax Court that the notes in question were "sham," but the opposite finding cannot possibly lead to the same conclusion. The very fact that notes were used instead of stock is consistent with common sense and this is evidence of the true intent of the taxpayer.

(b) All participants in the transaction consistently treated the notes as having reality and as evidence of indebtedness.

Without consistent treatment of the notes as evidence of debt, the finding of the Court that the intent of the taxpayer was to create a permanent capital investment instead of indebtedness, might have some credence.

Petitioner points out, however, that subsequent to the original transaction which set the form, the taxpayer, his brothers and the corporation consistently treated the notes as bona fide evidence of indebtedness. This is evidenced by the following facts:

(1) The final return of Miller Paint Co., a copartnership, reported a net gain of its fixed assets sold to the corporation, the net gain being the difference between the depreciated or adjusted value thereof and the

fair market value at the time of sale (Ex. 1-A). This gain in the amount of $6,683.68 was proportionately reflected and reported as a long term capital gain upon the partners' individual income tax returns (Ex. 2-B).

(2) All entries in the books of the corporation (Ex. 27, 28) reflected the existence of "notes payable," "Interest payable" and other entries consistent with the creation of indebtedness (Ex. 27, 28).

(3) Interest has been paid upon the indebtedness created since the date of incorporation (Tr. 123).

(4) The notes were separately inventoried in taxpayer decedent's estate and included in his Federal Estate Tax Return (Ex. 14, 6-F) and were treated by the Executor as something other than decedent's interest in the capital stock of the Miller Paint Co., Inc. (Ex. 14, 6-F).

(5) At no time was there any evidence of subordination of the debt to the claims of general creditors or any failure on the part of the note holders to demand and enforce payment according to the terms of the notes issued until double taxation upon the Herbert B. Miller Trust and the income beneficiary, Blance M. Miller on the same items of alleged income caused the income taxes to be confiscatory of any payment upon the principal of the notes (Tr. 122, 123).

(6) No evidence was introduced by the Commissioner to show false entries, false bookkeeping, deception, inconsistent treatment, fraud, or any other facts which would lead one to conclude that the manifest intent of the taxpayer was not the creation of an indebtedness.

(c) The corporation was adequately considering the underlying value of the capital stock in relation to the indebtedness, the earn-record of the business and the underlying value of the assets sold.

It has been the consistent position of the Commissioner that the corporation was inadequately capitalized because the nominal relation of debt to capital stock was approximately 174 to 1 at the time the corporation was organized. The Tax Court held in determining that the notes were a "sham" that there was "gross under capitalization here present" (Tr. 52). The Tax Court has erred in this conclusion because it failed to consider that:

(1) The earning record of the business gave every indication, at the time of the incorporation, that the notes could and would be paid off in accordance with the terms of the ordinary course of business and out of profit expected to be earned in a short period of years after the date of incorporation.

(2) The underlying value of the stock which exercised control and represented a proprietory interest in the concern as a going business after the corporation acquired the operating assets of the former partnership was greatly in excess of its subscription price of $3.50 per share.

(3) The earning record of the business for the years 1946 and 1947 and for all subsequent years was in fact sufficient to provide funds for the payment of and interest service upon the indebtedness created.

(4) The nature of the assets sold to the Miller Paint Co. were either subject to complete depreciation in a relative short period of time or would be self-liquidating in order to provide funds for the repayment of the notes.

Even the Tax Court concedes that the evidence shows that the earnings of the company would be sufficiently high and that in a relatively short period of time they would be able to withdraw the sums to make payments on the notes when due:

> "To be sure, the partners undoubtedly expected, as contended by petitioner, earnings to be sufficiently high in a relatively short period of time they would be able to withdraw sums approximating in amount their original capital investment without impairing necessary capital; and subsequent events seemed to prove this expectation to have been justified." (Tr. 45)

The Court, in making this finding, undoubtedly relied upon the copy of the Earning and Asset Schedule of Miller Paint Co., a copartnership, and Miller Paint Co., Inc. submitted in evidence as a Joint Exhibit 10-L. The Court also was aware that for the years 1946 and 1947, the years involved in the controversy, payments on the principal of the notes were made in the amounts of $7,500 and $10,000 respectively, when the only principal payment required by the terms of the note was $6,666.66. The Court also was probably impressed by the appraisement of the stock of Miller Paint Co. at $347.78 a share made as of a short period of a year and a half after the incorporation of the company.

Between January 1st and May 31, 1946, gross receipts of the Miller Paint Co. copartnership were $325,-528.09 (Ex. 1-A). The corporation had gross receipts of $403,809.06 between June 1st and November 30, 1946 (Ex. 4-D), and during the fiscal year ending November 30, 1947, gross receipts amounted to $864,540.75 (Ex. 5-E).

Earned surplus for the fiscal year ending 1946 was $19,487.88 and at the fiscal year ending 1947, $43,022.83 (Ex. 5-E). Analysis of the balance sheet of the corporation for these years indicates no impairment of capital caused by the payments on the notes.

These admitted facts are hardly an indication of under-capitalization.

The underlying fair market value of the assets transferred or acquired by a corporation has been taken into consideration to overrule's the Commissioner's contention of inadequate capitalization in at least nine cases: *Cleveland Adolph Mayer Realty Company,* 6 TC 730, Rev'd, 160 F. (2d) 1012 (CCA 6th); *Toledo Blade Company,* 11 TC 1079, Aff'd. 180 F. (2d) 357 (CA 6th); *New England Lime Company,* 13 TC 799 (1949); *O.P.P. Holding Corporation,* 30 BTA 337, Aff'd, 76 F. (2d) 11 (CCA 2nd); *BMC Manufacturing Corporation,* 11 TCM 376 (1952); *Earle v. W. J. Jones & Sons,* 200 F. (2d) 846 (CA 9th, 1952); *J. W. Walter, Inc.,* 23 TC No. 69 (1954); *Sheldon Tauber,* 24 TC No. 24 (1955); *Ainslie Perrault,* 25 TC No. 55 (1955).

In *Earl vs. W. J. Jones & Sons,* the capital stock amounted to only $1,000.00, but at the time of the re-

organization of the corporation one of the stockholders transferred to the corporation an option to purchase some mining property which had a fair market value of $50,000.00. Thereafter the stockholders advanced as loans to the corporation some $317,000.00, which the lenders later deducted as a bad debt. In allowing the bad debt deduction the Court said:

> "And the so-called capital contributions and loans in the instant case were not unidentified portions of a single investment, as was the situation in certain of the cases cited by appellants. The contribution of $1,000.00 to pay up the capital stock and the contribution of the mine property were recognized as wholly distinct from all other advances, which were expressly regarded as loans. And no inference adverse to taxpayer can be drawn from the fact that the stock certificates were not distributed until the advances had all been made.
>
> . . . .
>
> "Appellants also contend that this is a case of a corporate financial structure so overbalanced by indebtedness that it is lacking in substance for recognition for tax purposes. Considering (as we think it should be considered) the mine property as part of capital, the ratio of debt to capital after all advances had been made, and taking the most conservative estimate of the value of the mine value at the time of incorporation, was about six to one. We are not at all certain that such a financial structure is lacking in substance for recognition for tax purposes."

It is admitted that the stock of Miller Paint Co., Inc was appraised in the decedent's estate by a method which involved capitalization of the earnings of both the corporation and the partnership for a period extending back ten years (Tr. 30, Ex. 10-L). Assuming that

this stock had the same fair market value at the time that the corporation was organized the 300 shares of stock of which decedent owned 100 shares, in the Miller Paint Co., Inc., at the inception of the corporation, had a total value of $104,334.00. Indebtedness of the Company reflecting notes payable to the stockholders at its formation amount to a total sum of $174,571.26. Ratio of debt to capital was then approximately 1.67 to 1 based upon the following computation:

$$\frac{\text{NOTES: } \$174{,}571.26}{\text{VALUATION OF STOCK } 104{,}334.00} = 1.67$$

The going business value of the business was reflected in the stock valuation notwithstanding that as of the date of the death of the taxpayer there was an outstanding indebtedness owed to the stockholders in a total sum of $122,071.26. Petitioner submits that a ratio of debt to capital of less than 2:1 is not excessive.

In *J. W. Walter, Inc. vs. Commissioner, supra,* John W. Walter was operating a small electrical appliance business in New York, when he acquired a distributorship from Stewart Warner, after many months of negotiation. Expecting gross sales under the distributorship of $2,000,000 in the first year of operation with a net profit of 5% and a substantial increase in volume of subsequent years, he, after consulting with his attorneys and accountants, and being advised that his individual income tax would absorb most of the profit if he continued to operate as a sole proprietor, decided to incorporate, which he did, in 1945, transferring business assets to the corporation in the amount of $15,000 in

value and $10,000 in cash. For this consideration, the capital stock was issued to him. Shortly thereafter the corporation purchased the franchises held by him, personally, paying him therefor $100,000.00 in ten year 3½% debentures. In this case the Tax Court held that the debentures did not create an unreasonable debt equity ratio in petitioner's capital structure and found as a fact that the petitioner corporation received a valuable consideration for the issuance of the debentures by the assignment of the franchises from Walter, individually, to it. The opinion continues:

> "Nor can respondent's contention that these debentures were in fact equivalent to preferred stock be taken seriously. Unlike any of the cases in this field to which we have been referred, these debentures have none of the attributes of preferred stock. They fulfilled all the formal requirements of a short-term bond; they had a maturity date fixed in the reasonable future, ten years after the date of issuance; they afforded no basis for participation in management; and they imposed on petitioner a fixed liability to pay interest * * * irrespective of earnings or emergencies and at a modest rate of 3½% per cent. *Cf. Charles R. Huisking and Company,* 4 TC 595. No unusual unbalance in petitioner's ratio of equity capital to indebtedness resulted from their issue. *Cf. Mullin Building Corporation,* 9 TC 350, *aff'd.* (CA-3) 167 Fed. (2d) 1001; *Swoby Corporation,* 9 TC 887. As we have found, new property did flow to petitioner (corporation) upon their issuance. *Cf.* 1432 *Corporation,* 4 BC 1158, *aff'd.* (CA-2) 160 Fed (2d) 885. In these circumstances, that Walter and petitioner (corporation) subordinated the debentures to all other creditor claims, approximately two years after their issue date in order to obtain a favorable credit rating from Dun and Bradstreet, would not

be significant. See *O.P.P. Holding Corporation,* 30 BTA 337, *aff'd.* (CA-2) 76 Fed (2d) 11; *Sabine Royalty Corporation,* 17 TC 1071; *Ruspyn Corporation,* 18 TC 769. Decision will be entered for the petitioner."

In *Sheldon Tauber vs. Commissioner, supra,* decided approximately four months after the *Walter* case, the facts were these:

A partnership was operated by members of the Tauber family, who, by virtue of excessive withdrawals by some of the partners, owned widely varying shares of the net worth of the partnership. In 1946 they organized a corporation with $100.00 worth of stock owned equally by the four partners. The corporation then purchased the assets of the partnership for their net worth, the notes given therefor being distributed to the partners in accordance with their remaining investment in the partnership.

These notes were paid off within two and one-half years and the Commissioner sought to treat such payment as the payment of dividends, upon the premise that a corporation with capital stock of $100.00 and indebtedness of $209,453.38 was thinly capitalized.

The Court found that in view of the prospects of the business, the contracts which it had on hand, and other business factors, the actual value of the business transferred to the corporation was $150,000.00 in excess of their indebtedness of $209,453.38. It concluded, therefore, that the corporation had as capital, not merely the $100.00 in cash paid for the stock, but also $150,000.00 in additional value, as contrasted with the $209,453.38

in notes, and that therefore, "the total capital of the new corporation could not fairly be called 'thin'."

The Court, after pointing out that the indebtedness in effect merely equalized prior excessive withdrawals by some of the partners, concluded that:

> "The notes evidenced amounts owed and cannot be regarded as evidence of capital of the corporation. The facts in this case amply distinguish it from those cited by the Commissioner in which evidences of indebtedness issued by a corporation were held to be equivalent of stock because of thin capitalization, that is, unreasonable disproportion between the amount of stock and the amount of other securities issued by a corporation for property. The Commissioner is thus left with nothing to support the deficiencies which he determined."

The case continues with a discussion of the Commissioner's alternative contention that a capital gain was realized upon the exchange of the property for the notes, to the extent of the value of the notes. In this respect, the Commissioner was adopting the same position that the Millers adopted in our case, in their determination that a capital gains tax should be paid as a result of the transaction. In the *Tauber* case, however, it was held that the Commissioner had failed to sustain his burden of proving an affirmative position, and that no capital gains tax was due.

In *Ainslie Perrault vs. Commissioner, (supra)* each of two brothers who were equal partners, subscribed and paid $2,000.00 in cash for all of the stock of a new corporation. The two brothers then transferred a portion

of the partnership assets valued at $1,026,951.32 to the new corporation, which assumed partnership liabilities of $53,862.52, and agreed to pay the partners $973,088.80 in four installments with interest on the last three installments at 3%. No notes were issued and the indebtedness was created by the terms of a purchase contract. At the same time, the corporation acquired from the partnership orders or unbilled items and good will, having a substantial value of several hundred thousand dollars.

The Commissioner reasoned that if the purchase agreement was taken at its face value, then the ratio of indebtedness to capital was 1026 to 2, which he, in effect, said was so "terrific" as to demonstrate that what in form is indebtedness should in substance be considered capital.

The Court in holding for the taxpayer, stated:

> "We have not thought it necessary to determine the value of each separate asset that passed to the Corporation, but we have no hesitation in determining that they were of large value amounting to several hundred thousand dollars and constituted such an ample investment in the Corporation as to preclude any justification for holding under the thin capitalization doctrine that the transferred assets under the purchase agreement of January 5, 1948, should in substance be considered capital rather than a bona fide sale by the stockholders to the Corporation. John Kelley Co. v. Commissioner, 326 U.S. 521 (34 AFTR 314); Rowan v. United States, 219 F. 2d 51; Sun Properties, Inc. v. United States, 220 F. 2d 171; Sheldon Tauber, 24 T.C. — (May 9, 1955). We hold, therefore, that the transfer of assets under the agreement of January 5, 1948, does not come within the provisions

> of Section 112(b)(5), supra. So long as the Corporation was provided with adequate capital, as we have held it was, we know of no reason why the organizers of the Corporation could not sell other assets to the Corporation providing the selling price was not out of line with realities. Bullen v. State of Wisconsin, 240 U.S. 625 (3 AFTR 2944); John Kelley Co. v. Commissioner, supra."

How can the Tauber and Walter decisions, and particularly the Perrault decision, be rationalized with the Tax Court's decision in the case at issue?

Some attention should also be given to the nature of the assets sold to the corporation in return for the notes (Tr. 38).

First, $50,000 was cash, a quick asset subject to being used by the corporation and returned to the noteholders over a period of time.

Second, $89,328.84 were accounts receivable of the partnership which were collectible by the corporation in a relative short period of time and subject to the payment of $52,614.17 of accounts payable of the partnership, would produce over $36,000.00 in cash available for payments upon the notes.

Third, the inventory of $60,122.49, when sold at a profit by the corporation would produce more available cash for the repayment of the indebtedness. Using the fiscal year ending November 30, 1947, for example (Ex. 5-E) gross sales were $864,540.75 and the cost of goods sold was $616,412.58, leaving a gross profit on sales of $248,128.17 or a gross profit of a little less than forty

per cent. Applying this factor to the inventory of $60,000 would produce another gross profit of approximately $24,000.

Fourth, the depreciable or amortizable assets consisting of machinery, equipment, furniture, fixtures, delivery equipment, office equipment and unexpired insurance sold by the partnership to the corporation totalled $27,136.40. These assets would be subject to depreciation which, within a period of six years, at various depreciation rates, would provide a reserve of at least eighty per cent of the value thereof, which in turn, could be drawn upon for the payment of the indebtedness created by their purchase.

The *Miller* case does not involve a loan for the investment by the corporation in "permanent" assets as emphasized in the case of *Sam Schnitzer vs. Commissioner,* 13 TC 43 (1949), *aff'd. per cur.* 183 F(2d) 70, *Cert. denied,* 340 U.S. 911 (1950), where the proceeds of the alleged "loans" were used to erect a rolling mill.

The basically permanent assets, the real property consisting of the retail store and the factory was owned and rented to the corporation by the Miller Paint and Wallpaper Co., another copartnership consisting of the three Miller brothers (Tr. 25). The assets purchased by Miller Paint Co., Inc. from the Miller Paint Co. partnership were of such a nature that the passage of time alone would convert them into cash with which to repay to the indebtedness to taxpayer and service the interest upon the debt thereby created.

Some highly pertinent language appears in *Rowan vs. United States,* 219 F(2d) 51 (1955, CA-5). In holding for the taxpayer the Court said:

> "Many students of tax law have discussed the inadequately capitalized corporation, sometimes known as the 'thin corporation'. The Court, of course, recognizes the fact that stockholders who lend money to their own corporation obtain all the advantages of favorable tax treatment if the enterprise fails. But the court also recognizes that, entirely without reference to the incidence of taxes stockholders of corporations have always been free to commit to corporate operations such capital as they choose and to lend such additional amounts as they may elect to assist in the operation if that is their true intent, always thus reserving the right to share with other creditors a distribution of assets if the enterprise fails. It would obviously work an unwarranted interference by the courts in ordinary and perfectly proper business procedures for us to say that there can be established, as a matter of handsight, a ratio of stockholder owned debt to the capital of the debtor corporation. No stockholder could safely advance money to strengthen the faltering steps of this corporation (which, of course,) may be greatly t othe benefit of other creditors) if he is faced with the danger of having the Commissioner, with the backing of the courts, say, 'he had no right to launch a corporate business without investing in it all the money it needed, and investing in it the way that is most disadvantageous to himself, both as relates to taxation and as to other creditors.'
>
> "It is entirely within the competence of Congress to provide by statute for such ratio if it deems it advisable or necessary within the scheme of Federal taxation. It is not within our province to do so. Nor would it further the desirable end of certainty in taxes for us to do so."

> "In what we have said, we refer only to the situation wherein there is no evidence of an intent to make a contribution to capital other than the ratio between debt and stated capital. . . . "

Petitioner has no quarrel with the thesis of the Commissioner that the taxpayer expected that the principal of the notes would be paid out of earnings of the corporation but certainly this is not an unusual circumstance. Corporations, whether large or small, publicly owned or closely held, expect that their indebtedness, whether it is in the form of notes or debentures will be retired out of earnings. Corporations of all types, for more than a century, have generated their own capital by plowing back earnings into their business. It is part of the American business tradition which Congress has not yet changed by any specific enactment of its revenue laws.

A profitable money-making business, such as Miller Paint Co., in the years 1946 and 1947 engaged as it was, in supplying materials to a building and construction boom in the Northwest, flooded by new population during the war, needed little capital of the permanent type, as it could be reasonably expected that the profits of the company would be completely adequate, not only to repay its debt financing but within a period of a few years to generate its own capital out of accumulated profits. What the incorporators and stockholders of Miller Paint Co., Inc. contemplated at the time of the incorporation of the company came to pass and the very fact that the loans were being repaid more rapidly than the terms of the notes provided, shows that the judgment of the in-

corporators was correct in their conclusion that their permanent capital stock could be valued the minimum allowed by the laws of the State of Oregon and that there was no real risk in loaning operating capital to the corporation.

We are not dealing, in this case, with a bad debt deduction which has given rise to so many cases which discuss "thin incorporation." When a corporation fails and is unable to pay its debts, then it is easy, by hindsight, to make a finding that this should have been contemplated at the time of the formation of the corporation, and the sequence of events shows that there was substantial risk in loaning money to the corporation and there therefore the funds advanced were "risk capital".

Point 3

A finding that the notes are "sham" is beyond the issues raised by the pleadings.

The Tax Court's reasoning that the notes were sham is based upon three supporting reasons:

(1) The corporation was inadequately capitalized.

(2) There was no intention on the part of the organizing taxpayers that there was an indebtedness created which was intended to be repaid.

(3) The true intent of the taxpayers was only for the purpose of tax avoidance.

Assuming that the foregoing statements are true, we call to the Court's attention that the taxpayers, their at-

torneys and advisors have been guilty of a much more serious violation of the Internal Revenue Laws in that false and fraudulent minutes of the corporation were written up, false and fraudulent notes were issued by the corporation to its stockholders, and false and fraudulent income tax returns have been filed by the taxpayers.

In other words, the taxpayer is in effect charged with fraud with an intent to avoid payment of income taxes.

Examination of the Commissioner's answer (Tr. 20-22) discloses no charge of fraud or any affirmative pleading whatever charging that the notes were "sham". Under the circumstances, the pleadings in this case will not support the Tax Court's finding that the notes were "sham".

The Internal Revenue Code (1939) provides:

> "Sec. 1112. Burden of Proof in Fraud Cases.
>
> In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner."

Petitioner submits that the respondent has not maintained this burden by a preponderance of clear and convincing evidence.

Point 4

Sec. 112(b)(5) of the Internal Revenue Code of 1939, involving nonrecognition of gain in certain transfers is not applicable to the facts herein.

Some decision on this point is mandatory if only because the basis of the assets transferred to the corporation affects the earned surplus of the corporation for the years in question.

Internal Revenue Code (1939) provides:

"Sec. 112. Recognition of Gain or Loss

* * *

"(b) Exchanges Solely in Kind.—

* * *

"(5) Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. * * *"

From the *Regulations; Sec. 29.112 (a)-1* we quote:

"SALES OR EXCHANGES.—The extent to which the amount of gain or loss, determined under section 111, from the sale or exchange of property is to be recognized and is governed by the provisions of section 112. The general rule is that the entire amount of such gain or loss is to be recognized.

"An exception to the general rule is made by section 112(b)(1) to (5), inclusive, in the case of cer-

tain specifically described exchanges of property in which at the time of the exchange particular differences exist between the property parted with and the property acquired, but such differences are more formal than substantial. As to these, the Internal Revenue Code provides that such differences shall not be deemed controlling, and that gain or loss shall not be recognized at the time of the exchange. The underlying assumption of these exceptions is that the new property is substantially a continuation of the old investment still unliquidated; . . . "

"The exceptions from the general rule requiring the recognition of all gains and losses, like other exceptions from a rule of taxation of general and uniform application, are strictly construed and do not extend either beyond the words or the underlying assumptions and purposes of the exception. Nonrecognition is accorded by the Internal Revenue Code only if the exchange is one which satisfies both (1) the specific description in the Code of an excepted exchange, and (2) the underlying purpose for which such exchange is excepted from the general rule. The exchange must be germane to, and a ncessary incident of, the investment or enterprise in hand. The relationship of the exchange to the venture or enterprise is always material, and the surrounding facts and circumstances must be shown. As elsewhere, the taxpayer claiming the benefit of the exception must show himself within the exception.

"To constitute an exchange within the meaning of *Section 112(b)(1) to (5),* inclusive, the transaction must be a reciprocal transfer of property, as distinguished from a transfer of property for a money consideration only."

Petitioner submits that facts in the case do not fall with the exception to taxability as outlined in Sec. 112 (b)(5) I.R.C. for the following reasons:

(a) The stock issued by the corporation was paid for in cash, not from the partnership assets but from the personal bank accounts of the partners.

(b) No "securities" were ever issued by the corporation, within the meaning of the Internal Revenue Code.

(c) The evidence indicates that there was no "exchange" of property but rather a sale by the partners of certain assets to the corporation in return for cash consideration represented by the indebtedness created by the notes.

The note in question upon which payments were made was due in its entirety within five years from the date of its issuance and was in fact paid in full within four and one half years. As such it was a short term note which bore a fixed maturity date, was secured by a chattel mortgage, and was not subordinated to the claims of other creditors. In all ways it fell within the authority of the following cases which hold that short-term notes bearing a fixed maturity date and secured by a chattel mortgage, were not "securities" within the intent and meaning of Sec. 112(b)(5) I.R.C.; *Neville Coke and Chemical Co.,* 3 TC 113, *aff'd.* 148 F2d 599; (CCA 3rd, 1945); *Courtland Specialty Co. vs. Commissioner,* 60 F(2d) 937 (CCA 2d, 1932) *cert. denied* 288 U.S. 599, 77 L. Ed. 975, 53 S.Ct. 316 (1933); *Sisto Financial Corp.,* 47 BTA 425 *aff'd on this point,* 139 F(2d) 253 (CCA 2d, 1943); *Seiberling Rubber Co.,* 8TC 467, *Revsd. on other grounds* 169 F(2d) 595 (CCA 6th, 1948).

In order to hold that the note in question was a "security" the Court would have to reason that the note was of such dignity and formality to be classed as a "security" under authority of such cases as *Burnham vs. Comm.,* 86 F.2d 776 (CCA 7th, 1936), which involved notes having a ten year life. In the case at issue the notes were such as are issued everyday in the ordinary course of business by closely held corporations. They were not in registered form, were not issued in series, and bore on their face no indication that they were designed to be offered by the holders to and negotiated to the general public.

In the words of the Regulations previously quoted, there was no "reciprocal transfer of property, as distinguished from a transfer of property for a money consideration only". The notes were more evidence of the cash consideration for the sale of the partnership assets. Therefore, the transaction did not fall within the exception of the general rule that such transactions are subject to the recognition of gain and loss for tax purposes.

The regulation quoted, specifically points out that the nonrecognition of gain or loss is an exception to the general rule which must meet the specific description in the Code of an excepted exchange and points out that "the taxpayer claiming the benefit of the exception must show himself within the exception."

If the Court determines that the notes have validity and are not "sham" but are evidence of indebtedness,

there is no question that Sec. 112(b)(5) is inapplicable. If, on the other hand, the Court agrees with the Tax Court that the notes were "sham" and had no existence, the question still remains as to whether or not the assets transferred to the corporation represent capital stock or paid in surplus.

The Statutory Notice of Deficiency (Ex. H) and the Thirty Day Notice of Proposed Deficiency (Ex. I) show that the Commissioner treated the "loans" as paid in surplus which is in accord with the fact that the stock was not issued in exchange for the partnership assets.

If it is paid in surplus, then it should be paid in surplus to the extent of the assets' fair market value at the time of their transfer to the corporation. Sec. 112 (b)(5) would still have no application.

Point 5

Even if the notes are "sham" the repayment thereof does not constitute a taxable dividend, even though earned surplus is present.

The Internal Revenue Code (1939) provides:

"Sec. 115. Distributions by Corporations.

"(a) Definition of Dividend.—The term 'dividend' when used in this chapter * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the

taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made. * * *

"(b) Source of Distributions.—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. * * *

(c) Distributions in Liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts distributed (whether before January 1, 1939, or on or after such date) in partial liquidation (other than a distribution to which the provisions of subsection (h) of this section are applicable) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. If any distribution in partial liquidation or in complete liquidation (including any one of a series of distributions made by the corporation in complete cancellation or redemption of all its stock) is made by a foreign corporation which with respect to any taaxable year beginning on or before, and ending after, August 26, 1937, was a foreign personal holding company, and with respect to which a United States group (as defined in section 331(a)(2) existed after August 26, 1937, and before January 1, 1938, then, despite the foregoing provisions of this subsection, the gain recognized resulting from such distribution shall be considered as a gain from the sale or exchange of a capital asset held for not more than 6 months.

"(g) Redemption of Stock—(1) If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend."

"(i) Definition of Partial Liquidation.—As used in this section the term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

As previously pointed out, the Commissioner treated the loans as paid in surplus. If this is the Commissioner's theory, then the question arises whether the repayment to the stockholders of such paid in surplus is a dividend or essentially equivalent to a dividend within the meaning of Sec. 115 I.R.C. (1939).

Keeping in mind that the notes in question are enforceable obligations under the laws of the State of Oregon and that repayment of the principal must be made, because of the contractual obligations involved, it would seem to the petitioner that proper accounting procedures would be to charge the repayment of the principal of the loans for tax purposes to the paid in surplus account which the Commissioner has arbitrarily set up for tax purposes. As such, such payments

would clearly be a return of capital, not taxable as a dividend to the taxpayer. It must be remembered that from all times on, after the notes are declared to be sham and the debt is ceased to be recognized as bona-fide that the accounting procedures of fictional character are completely under the control of the Commissioner.

If, however, the correct solution to the problem is to treat the notes as consideration for the capital stock of the corporation, then the repayment of the notes would result in an involuntary partial liquidation of the corporation each time that a payment was made upon the principal of the notes. In such event, the partial liquidation would be one governed by the ordinary gain and loss provisions of the Internal Revenue Code.

Whether a partial liquidation or a cancellation of stock is essentially equivalent to a dividend under Sec. 115 (g)(1) I.R.C. 1939, always depends upon the facts and circumstances of the case. In the instant case, the corporation may be reasoned to be contractually bound to redeem its stock (i.e. notes) under a plan which would return to its stockholders (i.e. noteholders) their investment within a period of six years.

Petitioner has found no case which discussed the rationale of taxation of the principal of the repayment of notes which have been held without substance under a theory of "thin incorporation."

For authority that not all distributions to a stockholder out of earned surplus of a corporation are tax-

able as dividends, petitioner calls to the attention of the Court, the case of *Zenz vs. Quinlivan,* 213 F(2d) 914, (1952) *Comm. acq; Rev. Rul.* 54-548 1RB 1954-42, which holds that a distribution of an amount equal to the earned surplus of a corporation to a stockholder in return for a redemption of her stock was not essentially equivalent to a dividend. In this particular case, the redemption extinguished all interest of the taxpayer in the corporation, but the principle is there to be recognized.

The difficulty in cases of this kind stems from the fact that the Commissioner may say that the true facts of the case are such only for the purpose of taxation. In the case at issue this does not go very far in solving the problems with which your petitioner is faced.

Your petitioner is also the Trustee of the Herbert B. Miller Estate and has in his possession the $29,000 note, the principal of which is a capital asset of the trust estate. No decision of this Court or of the Tax Court is going to effect its enforceability against Miller Paint Co., Inc. as a matter of Oregon Law including the law of trusts. When the principal is collected upon this note, it will have to remain as a capital asset of the trust estate and cannot be distributed under the terms of decedent's will to Mrs. Blanche Miller, the income beneficiary. Examination of Exhibits 20, 21, 22 and 23 reveal that the Commissioner considers principal payments upon the Miller Paint Co. notes to be dividend income both to the trust and to Mrs. Miller, even though Mrs. Blanche Miller cannot possibly receive distribution of this alleged trust income under Oregon law.

As long as the Commissioner has decided to rearrange the legal relationships for tax purposes between the decedent taxpayer and the Miller Paint Co., he should be consistent by the terming the repayment of the principal of the notes essentially a return of capital to the taxpayer involved, as neither the corporation nor the trustee have now any control over the legal relationships between them.

CONCLUSION

Cases of the nature of the one involved in this appeal always seem to rest upon a finding of fact that the Commissioner of Internal Revenue knows more about what was actually done and intended in the formation of a corporation than the principals did themselves. It is recognized that the Commissioner is motivated by desire to equitably collect taxes and to interpret every taxable transaction in a light most favorable to the Government. He has hesitated, however, to claim fraud on the part of the taxpayer. We think the reason is obvious.

The terms "thin incorporation" and "inadequate capitalization" were unknown to income tax law at the time of the transactions involved in this case. Debt financing of small, closely held corporations was and still is present in a majority of all corporations formed in Oregon. Until Congress interdicts debt financing by a change in the income tax law, which would apply without discrimination to all corporations, large and small,

Miller Paint Co., Inc. should not be singled out for this special tax treatment.

The petitioner submits that the Honorable Court should face business realities, should re-examine the Tax Court's position with respect to debt financing of corporations and hold that, in the absence of a finding of fraud on the part of the incorporators motivated by tax evasion as distinguished from tax avoidance, that the form of corporate financing is of no concern to the Commissioner of Internal Revenue.

Respectfully submitted,

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No. 15031

In the United States Court of Appeals for the Ninth Circuit

ESTATE OF HERBERT B. MILLER, Deceased, UNITED STATES NATIONAL BANK OF PORTLAND, (Oregon), Administrator, d.b.n., c.t.a., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 32-56) are reported at 24 T.C. 923.

JURISDICTION

These petitions for review (R. 7, 11, 59-61) involve federal income taxes for the calendar years 1946 and 1947. Taxpayer died on February 13, 1948. (R. 23.) On February 28, 1950, and August 7, 1950, respectively, the Commissioner of Internal Revenue mailed to taxpayer's former executor—who was thereafter ap-

pointed administrator d.b.n., c.t.a. (R. 24)—notices of deficiency for the years 1946 and 1947, in the amounts, respectively, of $1,882.27 and $3,982.35 (R. 25). Within ninety days after the mailing of the first notice of deficiency and on May 29, 1950, taxpayer's former executor filed a petition with the Tax Court for a redetermination of the deficiency for 1946. (R. 3, 12-17.) Within ninety days after the mailing of the second notice of deficiency and on October 19, 1950, taxpayer's former executor filed a petition with the Tax Court for a redetermination of the deficiency for 1947. (R. 8.) The cases were consolidated on October 12, 1954. (R. 6, 10.) The decisions of the Tax Court were entered on August 24, 1955. (R. 7, 11, 57-58.) The cases are brought to this Court by petitions for review filed on November 17, 1955. (R. 7, 11, 59-61.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

Pursuant to a prearranged plan, members of a partnership organized a corporation, paid a nominal amount for all its stock, which was no par and of a nominal declared value, and thereafter transferred to the corporation all of the operating assets of the partnership plus $50,000 in cash in exchange for interest-bearing notes of the corporation.

1. Did the corporate notes represent capital investments rather than bona fide creditor-debtor transactions, so that the transfer of the partnership assets to the corporation constituted part of a nontaxable exchange under Section 112 (b)(5) of the Internal Revenue Code of 1939?

2. Did payments of purported interest and principal on the notes constitute taxable dividends, within the meaning of Section 115 (a) of the Internal Revenue Code of 1939?

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * *

(b) [As amended by Sec. 213 (c) of the Revenue Act of 1939, c. 247, 53 Stat. 862] *Exchanges Solely in Kind.*—

* * * * *

(5) *Transfer to corporation controlled by transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. Where the transferee assumes a liability of a transferor, or where the property of a transferor is transferred subject to a liability, then for the purpose only of determining whether the amount of stock or securities received by each of the transferors is in the proportion required by this paragraph, the amount of such liability (if under subsection (k) it is not to be considered

as "other property or money") shall be considered as stock or securities received by such transferor.

* * * * *

(26 U.S.C. 1952 ed., Sec. 112.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(8) *Property acquired by issuance of stock or as paid-in surplus.*—If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b)(5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * *

(26 U.S.C. 1952 ed., Sec. 113.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term "dividend when used in this chapter * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

(b) *Source of Distributions.*—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 115.)

STATEMENT

The facts material to this appeal, as found by the Tax Court (R. 34-41), may be summarized as follows:

Prior to June 1, 1946, taxpayer Herbert B. Miller and his two brothers, Ernest and Walter, were equal partners in the paint manufacturing and marketing business, doing business as Miller Paint Company (hereinafter called the partnership). The partnership assets consisted of personal property, accounts receivable and cash; its premises were rented from another partnership composed of the same brothers. (R. 34-35.)

Sometime in 1943 or 1944 Ernest and Walter were informed that taxpayer had cancer, and could live only a few years longer. It is not apparent whether taxpayer ever became aware of his condition. Ernest and Walter became concerned over the problem of continuity of the business in case of the death or incapacity of a partner. Without revealing anything to the taxpayer relative to his physical condition, they convinced him that some steps should be taken to insure such continuity. (R. 35.)

Taxpayer was married and had children; Ernest was married but childless; and Walter was unmarried. The three brothers desired an arrangement whereby, on the death or incapacity of a partner, the business could carry on free of interference, regardless of possible complications in the eventual probate of an estate; and whereby an estate could be created for the benefit of a decedent's family. In addition, Ernest wished to leave his share of the business to some employees without disturbing management and control. (R. 35.)

In late 1945 the partners were advised by counsel that the corporate form would best suit their purposes. They decided to form a corporation and transfer to it the assets necessary to carry on the business, but to take the cash of the partnership into their hands individually. In the years immediately prior to June 1, 1946, earnings had been high, and no evidence was presented suggesting doubts at that time that the prosperity of the business would continue. (R. 36.)

In accordance with the plan to incorporate the business, Miller Paint Co., Inc. (hereafter called the corporation), was organized under the laws of Oregon on or about May 13, 1946. Total authorized capital consisted of 300 shares of no par stock. Oregon law re-

quires that a corporation with no par stock have a capital investment of at least $1,000. Each partner subscribed for 100 shares at a stated value of $3.50 per share, and paid the stated value in cash from his respective personal bank account. (R. 36.)

The corporate charter was received on May 18, 1946. The stock was issued on May 20; and on the same day, the first meeting of the board of directors was held. It was resolved that the corporation borrow $50,000 from the three partners and execute a three-year promissory note therefor bearing interest at five percent. This resolution was carried out on June 1, 1946. Thereafter, at the second meeting of the board on June 3, it was resolved that the corporation purchase from the partners, at inventory value, substantially all the operating assets of the partnership. The fair market value of such assets was $86,622.49; and a note in such amount was issued to the partners in their joint names, payable in annual installments of no less than $20,000, and bearing interest at five percent. Another resolution called for the purchase by the corporation of certain intangible assets of the partnership, subject to liabilities. The net fair market value thereof was $37,948.77, and a note in that amount was issued to the partners in their joint names, payable six years from date and bearing interest at five percent. As security for the two notes the corporation executed and delivered a chattel mortgage. (R. 36-37.)

The partners at all times considered their interests in the partnership assets and in the corporate notes received therefor to be equal. (R. 37.)

As a result of the above transactions, the corporation acquired a substantial amount of cash and the bus-

iness assets of the partnership, and succeeded to the partnership's business. The tangible assets transferred included inventory, machinery and equipment, and furniture and office equipment. The adjusted basis of the partnership in these assets on June 1, 1946, was less than the fair market value thereof. The partnership reported a gain in the amount of $6,683.68, which was proportionally reflected and reported as long-term capital gain on the individual returns of the partners. The intangible assets transferred consisted of petty cash, accounts receivable, and unexpired insurance; and were transferred subject to accounts payable. (R. 38.)

On July 31, 1946, the board of directors met and resolved that the three corporate notes theretofore issued be canceled, and that in lieu thereof new notes be issued separately to each partner in the amount of his one-third interest. Accordingly, in lieu of the notes for $50,000 and $37,948.77, which were canceled, each partner received a new note for $28,874.16. Of the new notes issued, the latter were payable in annual installments of no less than $6,666.66, while the former were payable six years from date. All bore interest at five percent. By resolution of the directors, the previously executed chattel mortgage became security for the payment of the new notes. The books of the corporation have at all times carried the amounts of the notes as a "Notes Payable" liability. (R. 39.)

In 1946 and 1947 taxpayer received amounts designated as payments on the principal of the note for $28,874.16 held by him. These payments amounted to $7,500 in 1946 and $10,000 in 1947. Equal amounts were paid to Ernest and Walter on their respective notes, and a corresponding reduction in the "Notes

Payable" account was taken on the books of the corporation. (R. 39.)

Despite substantial earnings, the corporation has never formally declared a dividend. (R. 39.)

Ultimate facts found by the Tax Court (R. 40-41) may be summarized as follows:

The principal purpose in forming the corporation was to transfer to it the business conducted up to that time by the partnership together with a substantial amount of cash. No material change in the investment of the partners was contemplated, except that they would now be carrying on the same business in corporate form. (R. 40.)

No business reason dictated the formal method of capitalization undertaken. The issuance of stock with a declared value of $1,050 was viewed by the partners as merely the first step in a single plan, the over-all objective whereof was to transfer the paint business to the corporation. The various steps outlined above, including the transfers of tangible and intangible partnership assets, were in fact parts of a single integrated transaction. (R. 40.)

The assets and cash transferred to the corporation were intended by the partners as a permanent investment. There was no bona fide intention to effect a sale or dispose of the business in any other manner. The notes did not create a bona fide debtor-creditor relationship; the assets and cash transferred constituted in substance, though not in form, the consideration paid for the stock. (R. 40.)

The payments at issue (which purported to be payments on the notes held by taxpayer) were received by taxpayer as a stockholder, not as a creditor; and con-

stituted taxable dividends to the extent of available earnings and profits. (R. 40-41.)

The integrated transaction described above was in substance a transfer of property solely in exchange for stock of the transferee corporation, within the meaning of Section 112(b)(5) of the Internal Revenue Code of 1939, which withholds recognition of gain to the transferors; and the basis of the corporation is the same as that in the hands of the transferors prior to the exchange, under Section 113(a)(8) of the Internal Revenue Code of 1939. (R. 41.)

SUMMARY OF ARGUMENT

Taxpayer and his brothers decided to incorporate their partnership business. They organized a new corporation; transferred to it partnership assets other than cash in exchange for notes totaling over $124,000; advanced $50,000 in cash as a purported loan, taking another note therefor; and paid $1,050 in cash for all of the stock of the corporation. They withheld the partnership's cash on hand, totaling over $98,000; and thus, in effect, the corporation received the total assets of the partnership less about $47,000 in cash—i.e., the difference between the cash in hand withheld and the cash transferred.

The underlying question in this litigation is whether a bona fide debtor-creditor relationship arose upon the issuance of the corporate notes in question. The Tax Court answered this question in the negative; and we submit that its finding was amply warranted by the record.

A true creditor interest must reflect an intention to subject the corporation to an absolute obligation, and to enforce such obligation in accordance with its terms;

whereas a true stockholding interest reflects the commitment of assets to the fortunes of the business, with the hope of reaping profits and, conversely, the expectation of sharing losses. These are the controlling criteria—not the forms resorted to by the parties.

In the case at bar, the avowed intention of the brothers was to insure continuity of the business. This intention is consonant only with the view that the assets represented by notes constituted capital investments; for it is clear that enforcement of the notes totaling $174,000, in the event the corporation was unable to pay them, would have resulted in liquidation of the business or heavy mortgages at prohibitive cost. It is not to the point, of course, that the earnings of the corporation were high enough to pay the notes in accordance with their terms. The question is whether the notes created an *absolute* obligation, repayable in *any* event; and this question can only be answered by reference to possible adversity as well as to possible prosperity. If the intention is pay the notes out of earnings, and only so far as earnings make payment possible, then the notes reflect capital investments. And we submit that this was clearly the intention of the Miller brothers, as the Tax Court found.

Since, then, all of the assets transferred constituted capital investments, it follows that there was an exchange of property solely for stock or securities within the meaning of Section 112 (b)(5) of the Internal Revenue Code of 1939; and hence that no gain or loss is recognized on the exchange. It follows further that corporate distributions designated as payments of principal on the purported notes were, in reality, taxable dividends under Section 115 (a) of the 1939 Code.

ARGUMENT

I

The Tax Court Was Amply Warranted by the Record in Finding as a Fact that No Valid Debtor-Creditor Relationship Arose upon the Issuance of the Corporate Notes in Question

This litigation draws into question the nature of certain transactions which took place in 1946, whereby the business of a partnership became the business of a closely-held corporation. Prior to May, 1946, the business was conducted by taxpayer Herbert B. Miller in partnership with two brothers. On May 13, 1946, the partners organized a corporation under the laws of Oregon, which require that a corporation with no par stock have a capital investment of at least $1,000. The authorized capital of the new corporation consisted of 300 shares of no par stock. The partners purchased 100 shares each of this stock at the stated value of $3.50 per share, with funds from their personal bank accounts; and thus for an investment of $1,050 became owners of all of the corporation's stock. Within a few days thereafter, the operating assets of the partnership were transferred to the corporation. This transfer was cast in the form of a sale, the Miller brothers receiving two interest-bearing notes totaling $124,571.26 which were issued to them in their joint names. The brothers also advanced $50,000 in cash to the corporation, purportedly as a loan and receiving an interest-bearing note therefor. (R. 36-37.) As to the source of this $50,000, the record discloses that the partnership had on hand at the time of dissolution $98,720.15 in cash which was owned equally by the partners (Ex. 1-A); and that this cash was taken out by the partners

prior to the transfer of the partnership assets to the corporation (R. 44).

There are two specific issues in this case. The first is whether the exchange of partnership assets and cash for no par stock and corporate notes constituted, in reality, a tax-free exchange under Section 112 (b)(5) of the 1939 Code, *supra.*[1] The second is whether distributions by the corporation to taxpayer in 1946 and 1947, purportedly as payments of principal upon one of the notes issued for the partnership assets, were in reality taxable dividends to the extent of available earnings and profits under Section 115 (a) of the 1939 Code, *supra.*

Underlying these specific issues is a broader question: did the corporate notes reflect bona fide debts or capital investments? This question is one of fact relating to the intent of the parties, which is to be ascertained from all relevant facts and circumstances. *Earle* v. *W. J. Jones & Son,* 200 F. 2d 846 (C.A. 9th); *United States* v. *Title Guarantee & Trust Co.,* 133 F. 2d 990 (C.A. 6th); *Bowersock Mills & Power Co.* v. *Commissioner,* 172 F. 2d 904 (C.A. 10th); *Wetterau Grocer Co.* v. *Commissioner,* 179 F. 2d 158 (C.A. 8th); *Commissioner* v. *Meridian & Thirteenth R. Co.,* 132 F. 2d 182 (C.A. 7th); *Rowan* v. *United States,* 219 F. 2d 51 (C.A. 5th); *Matthiessen* v. *Commissioner,* 194 F. 2d 659 (C.A. 2d).

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[1] In its final return the partnership reported a capital gain of $6,683.68 on the purported sale of the partnership assets to the corporation; and this was proportionally reported as long-term capital gain in the partners' individual returns. (R. 38.) The Commissioner subsequently determined that the distributive share of capital gain reported by taxpayer should be eliminated from income, because no gain or loss should be recognized upon the transfer of the partnership assets to the corporation. (R. 20.)

As this Court said in *Washmont Corp.* v. *Hendricksen,* 137 F. 2d 306, 308:

> Not any of the cases which have decided this issue as to whether certificates are evidences of debt or stock ownership comprehend all the points that arise in this case. The decision in all cases has turned on the facts of the individual case. In each case, the court must determine whether the transaction was an investment in stock or a loan to the corporation.

In the case at bar, the Tax Court found as a fact (R. 40) that, in transferring the partnership assets and cash to the corporation, the Miller brothers intended to make a capital investment; and hence that the corporate notes did not reflect a bona fide debtor-creditor relationship. In making that finding the Tax Court had before it not only stipulated facts and exhibits but testimony of taxpayer's witnesses. (R. 80-135.) The burden is upon the taxpayer to show that this finding is clearly erroneous. *Grace Bros.* v. *Commissioner,* 173 F. 2d 170 (C.A. 9th). We submit that the finding is not only free from clear error, but is amply warranted by the record. Before turning to the facts of the case, however, it is important to clarify just what role intention plays in cases of this kind, under the decided cases.

In *Wilshire & West. Sandwiches* v. *Commissioner,* 175 F. 2d 718, this Court quoted with approval the following language from *Commissioner* v. *Meridian & Thirteenth R. Co.,* 132 F. 2d 182 (C.A. 7th) (p. 721):

> It is often said that the essential difference between a creditor and a stockholder is that the latter intends to make an investment and take the risks

of the venture, while the former seeks a definite obligation, payable in any event.

Similarly, in *United States* v. *Title Guarantee & Trust Co.,* 133 F. 2d 990 (C.A. 6th), the court declared, italicizing part of its language for emphasis (p. 993):

> *The essential difference between a stockholder and a creditor is that the stockholder's intention is to embark upon the corporate adventure, taking the risks of loss attendant upon it, so that he may enjoy the chances of profit.* The creditor, on the other hand, does not intend to take such risks so far as they may be avoided, but merely to lend his capital to others who do intend to take them.

In the application of these criteria, it is well settled that labels and forms are not conclusive, but that the true intention of the parties is to be determined from *all* of the relevant facts and circumstances. Thus it is said in *Schnitzer* v. *Commissioner,* 13 T.C. 43, 60-61, affirmed, 183 F. 2d 70 (C.A. 9th), certiorari denied, 340 U.S. 911—

> in deciding whether or not a debtor-creditor relation resulted from advances, the parties' true intent is relevant * * *. Bookkeeping, form, and the parties' expressions of intent or character, the expectation of repayment, the relation of advances to stockholdings, and the adequacy of the corporate capital previously invested are among circumstances properly to be considered, *for the parties' formal designations of the advances are not conclusive, * * * but must yield to "facts which even indirectly may give rise to inferences contradicting" them.* (Emphasis added.)

Accord: *United States* v. *Title Guarantee & Trust Co., supra,* p. 993; *Washmont Corp.* v. *Hendricksen, supra; John Wanamaker Philadelphia* v. *Commissioner,* 139 F. 2d 644 (C.A. 3d); and *Helvering* v. *Richmond, F. & P.R. Co.,* 90 F. 2d 971, 975 (C.A. 4th).

And, finally, the courts are agreed that where inadequacy of capitalization is extreme, substantially all of the assets of the business being transferred to the corporation in the guise of a sale or loan, that is one of the significant facts to be weighed by the fact finder in its determination whether the form of the transaction is to be disregarded and the transfers treated as capital investments.[2]

Thus in *Schnitzer* v. *Commissioner, supra,* the court said (p. 62):

> A corporation's financial structure in which a wholly inadequate part of the investment is attributed to stock while the bulk is represented

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[2] Petitioner contends that the ratio of 174 to 1, as between the face value of the notes and the stated value of the stock in the case at bar, is not the true ratio between the value of the notes and the stock because, allegedly, the stock really had a fair market value at the time of issuance of $104,000, rather than $1,050. Petitioner reaches this result by resorting to a method of capitalizing earnings. (Br. 32-33.) But in taking this position, petitioner ignores—and contradicts—the position taken by the Miller brothers themselves in reporting the "sale" of the partnership assets to the corporation in their 1946 returns. In those returns the brothers represented that the fair market value of *all* business assets transferred (other than cash) was the amount of $124,571.26; and measured their alleged capital gain as the difference between this amount and the depreciated book value of the assets. (Exs. 1-A, 2-B.) It appears, then, that the Miller brothers did not consider that any such values were transferred to the corporation as are now contended for by petitioner. In the absence of any other direct evidence as to the value of the business assets at the time of the exchange, the Tax Court was surely warranted in finding that the value of the stock was its stated value of $1,050.

> by bonds or other evidence of indebtedness to stockholders is lacking in the substance necessary for recognition for tax purposes, and must be interpreted in accordance with realities.

Put another way in equally cogent language, it is said in *Dobkin* v. *Commissioner,* 15 T.C. 31, 33, affirmed, 192 F. 2d 392 (C.A. 2d):

> When the organizers of a new enterprise arbitrarily designate as loans the major portion of the funds they lay out in order to get the business established and under way, a strong inference arises that the entire amount paid in is a contribution to the corporation's capital and is placed at the risk in the business. *Cohen* v. *Commissioner,* 148 Fed. (2d) 336; *Joseph B. Thomas,* 2 T.C. 193.

See also: *1432 Broadway Corp.* v. *Commissioner,* 4 T.C. 1158, affirmed, 160 F. 2d 885 (C.A. 2d); *Swoby Corp.* v. *Commissioner,* 9 T.C. 887; *Janeway* v. *Commissioner,* 147 F. 2d 602 (C.A. 2d); *Matthiessen* v. *Commissioner,* 194 F. 2d 659 (C.A. 2d); *Bair* v. *Commissioner,* 199 F. 2d 589 (C.A. 2d); *Bachrach* v. *Commissioner,* 18 T.C. 479, affirmed *per curiam,* 205 F. 2d 151 (C.A. 2d); *Earle* v. *W. J. Jones & Son,* 200 F. 2d 540 (C.A. 9th); *Sogg* v. *Commissioner,* 194 F. 2d 540 (C.A. 6th); cf. *Rowan* v. *United States,* 219 F. 2d 51 (C.A. 5th).

Turning, then, to the facts of the case at bar, we freely concede at the outset that the formal criteria of indebtedness were satisfied by the steps which taxpayer and his brothers took in setting up the purported sales and loan to the corporation. We do not

dispute what petitioner repeatedly calls (Br. 14, 16) the "impeccable" form of the notes, the bookkeeping entries, and so forth. And when petitioner asks (Br. 18) "as a matter of form, what more could the taxpayer have done to legally create an 'indebtedness' * * *?" we answer, "Nothing". Indeed, where, as here, the parties deliberately adopt certain forms with the express purpose of achieving desired tax results, it is not surprising that the forms should be impeccable. But the form is not at all controlling in determining the application of the relevant statutory provisions. It is the intention of the parties that controls as, indeed, taxpayer concedes. (Br. 18-19.) And we submit that the facts of record, *aliunde* the forms employed, clearly demonstrate that the intention of taxpayer and his brothers, under established criteria, was to make a capital investment.

Taxpayer and his brothers formed the new corporation, not to launch a new business or a modified business, but to continue in corporate form the same business they were conducting as partners. They transferred to the new corporation business assets totaling over $174,000—substantially all the assets of the partnership save for part of the cash on hand. No new capital was infused into the business, unless the nominal amount of $1,050 paid for stock be so considered. And even the $1,050 was hardly new capital in any substantive sense. The Miller brothers retained over $98,000 of the partnership's cash on hand; "loaned" $50,000 in cash to the corporation; and paid $1,050 in cash for all the stock. Thus, in effect, the corporation received the assets of the partnership less about $47,000 —i.e., the difference between the cash retained and

the cash transferred, which the Miller brothers apparently decided was not needed in the operations of the business. In short, the cash assets of the business were somewhat curtailed upon incorporation—not expanded. In all other respects the assets remained virtually the same. And the Miller brothers received equal interests in the stock and purported notes of the corporation, just as they had been equal partners.

Under these circumstances, there is surely only one realistic conclusion to be drawn. Just as the Miller brothers *qua* partners were equal owners of the business and all its assets, so *qua* stockholders they continued to be equal owners thereof. Petitioner's arguments to the contrary, in essence, come down to this contention: that the Miller brothers continued as owners of the *business* (through purchase of the stock for a nominal amount) but not as the equitable owners of the assets of that business—the machinery, equipment, inventory, accounts receivable, and so forth, which constituted such assets. This position is untenable.

A true creditor interest must reflect an intention to subject the corporation to an absolute obligation, and to enforce such obligation in accordance with its terms; whereas a true stockholding interest reflects the commitment of assets to the fortunes of the business, with the hope of reaping profits and, conversely, the expectation of sharing losses.

Of course the intention of the parties is the ultimate test. But where certain overt acts have necessary legal consequences, the only question is whether those acts have been performed in accordance with the intention of the parties. Here, as we shall see, the parties were

rightfully held to have intended to have assumed the risks of proprietors and not (despite the forms used) to occupy the position of creditors.

In committing the assets of their business to the new corporation, the Miller brothers naturally hoped to reap profits from the continued operation of the business. Petitioner concedes that taxpayer expected not only the interest but the principal of the notes to be paid out of earnings. (Br. 41.) It is not conceded that taxpayer intended such payments to be contingent upon earnings; but it appears quite clear, in fact, that the payments of principal in 1946 and 1947 were *geared* to earnings, just as would have been true if the profits had been used to pay dividends. The note upon which the payments were made called for annual payments of no less than $6,666.66, thus setting a minimum but no maximum; and taxpayer received $7,500 in 1946 and $10,000 in 1947, designated as payments on principal. (R. 39.) These payments reflect the fact noted by petitioner (Br. 41) that the hopes of high profits were rewarded and hence that the purported loans "were being repaid more rapidly than the terms of the notes provided * * *."

But would the Miller brothers have enforced the notes according to their letter, had the business unexpectedly fallen upon hard times? Surely not. Where substantially all the assets of a corporation are represented by notes, and the corporation defaults, literal enforcement of the notes must have one of two results, as noted in *Mullin Building Corp.* v. *Commissioner,* 9 T.C. 350, 355, affirmed *per curiam,* 167 F. 2d 1001 (C.A. 3d). Either the corporation must be liquidated, or its assets must be so heavily mortgaged as to siphon

off a large part of the corporate earnings in interest on the mortgage. And hence where the holders of the notes are also the stockholders, as the court said in *Mullin,* literal enforcement of the notes (p. 355)—

> would be too irrational * * * to merit * * * contemplation. * * * Such a course is not within the realm of sane business practice and we are convinced that it was not intended.

And the Tax Court here made a specific finding, stating (R. 45-46)—

> we have no doubt, from a reading of the entire record, that no payment was ever intended or would ever be made or demanded which would in any way weaken or undermine the business.

In this respect, we believe that it is most significant that the very purpose which impelled the brothers to incorporate their partnership business, can not be reconciled with the contention that, after incorporation, they no longer possessed an ownership interest in the business assets, but are to be treated as creditors to the extent that they caused their corporation to issue "notes" instead of stock. That is, it is undisputed that the principal purpose of incorporating the partnership business was to permit a continuity of the business so that the death or incapacity of one of the brothers would not interfere with the business being carried on, and also so that the brothers could create an estate for the benefit of their families in case of death. (R. 35.) But that purpose would have been subject to frustration rather than fulfillment if

the most substantial part of the business assets had been sold in reliance on the corporation's promise to pay the self-styled notes which were issued. If the business had experienced losses, rather than profits, payment of the principal of the notes at maturity, or even the payment of interest on the notes, would have caused a disruption of the corporation's business or of the ownership interest in the business which the parties sought to perpetuate. This, of course, would have been the precise opposite of what the parties set out to accomplish.

It is true that the business prospered and this eventuality never materialized. But businessmen do not arrange their affairs with blind optimism. The possibility of business reverses is always present.[3] And the acid test of the relationship would come with business reversals, not with business profits. Assuredly, the Tax Court does not commit reversible error where, as here, it concludes that the parties did not truly intend to create a corporate debt which would be payable at all events when their very purpose was to establish a business enterprise which would not be subject to such disruptive forces. This conclusion results from the fact finder having accepted the parties' own representations respecting the objectives which they sought to achieve and in rejecting their conten-

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[3] It is not to the point, of course, that the Miller brothers hoped that their business would continue to earn high profits, and that this hope was fulfilled. If this were a material factor in these cases, then those taxpayers who guessed right as to future profits would receive them *qua* creditors, while those taxpayers who guessed wrong—and, inevitably, refrained from enforcing their notes—would be viewed differently for tax purposes. But it is not a matter of hindsight. The tests relate to intention at the time of incorporation.

tion that the form which they adopted truly reflected that intent. As the Tax Court said (R. 47-48):

> * * * in the light of all the surrounding facts and circumstances, it is not reasonable to accept the absoluteness in form of the notes at face value. To do so would be to impute a willingness on the part of the partners to endanger their chief source of livelihood.

It has already been shown that the brothers could not have intended a fixed obligation. They hoped for high profits, and intended payments on the notes to be geared to and paid out of such earnings; but absent the necessary profits, they surely would not have enforced the notes at the cost of liquidating the corporation or mortgaging all its assets. The payment of the notes being thus contingent upon profits, the taxpayer's family stood in no better position than if all of the assets had been allocated to stock.

Petitioner relies particularly upon several cases in this connection including *John W. Walter, Inc.* v. *Commissioner,* 23 T.C. 550; *Tauber* v. *Commissioner,* 24 T.C. 179; and *Perrault* v. *Commissioner,* 25 T.C. No. 55. These cases are clearly distinguishable in significant ways. In *John W. Walter, Inc.,* the taxpayer—sole proprietor of a small electrical appliance business—incorporated his business, transferring assets totaling $25,000 to the corporation and issuing stock therefor. There is no indication that the assets exchanged for stock did not comprise all, or substantially all, of the assets of the business as of the time of incorporation. This, without more, under the principles discussed above, made taxpayer the proprietor in fact as well as in name of the corporation, regardless of

the large expansion of the business contemplated and effected by the subsequent transfer of a distributorship to the corporation.

In *Tauber,* the business assets transferred from a partnership to a new corporation had a fair market value at the time of transfer considerably in excess of book value, as the partners well knew. The court found that the partners intended to transfer the full value of the partnership assets; that the excess of fair market value over book value was about $150,000; and that this excess was allocable to stock, since the partners had taken corporate notes only for $209,000—which represented the book value of the assets. In the case at bar, on the other hand, the purported notes totaled the full fair market value of all the assets transferred save for the $1,050 in cash allocated to stock. As for *Perrault,* the transfers there—like the transfers in *Tauber,* and unlike the transfers in the case at bar—resulted in the corporation receiving total assets considerably in excess of the face value of the stock and corporate notes combined; and the court found that the excess was properly allocable to stock. The decision in *Earle* v. *W. J. Jones & Son,* 200 F. 2d 846 (C.A. 9th), upon which petitioner also relies, is distinguishable upon the same grounds.

It is obvious then that none of the above cited cases supports the petitioner's contention that the value of stock may be written up by a method of capitalizing earnings, even though substantially all of the business assets are represented—at full fair market value—by purported notes.

The taxpayer also relies on the decision in *Kraft Foods Co.* v. *Commissioner* (C.A. 2d), decided April 2,

1956 (1956 C.C.H., par. 9428). While we believe that the decision in that case is erroneous, as is shown in the dissenting opinion of Judge Clark, there are many factual differences between the cases which make *Kraft* a distinguishable situation. The principal distinction is that in *Kraft* there was no inconsistency between the purpose of creating a debt and any other purpose which the parties had. Here, as we have seen, the purpose of incorporating the business is at war with the assumption that a true debt was created.

In sum, therefore, we submit that the business assets transferred by the Miller brothers to the corporation constituted, in their entirety, a capital investment, committed to the fortunes of the corporate business. It follows, as the Tax Court held, that no valid debt-creditor relationship arose upon the issuance of the purported notes; and that the no par stock issued to the brothers, purportedly for $1,050 in cash, represents in reality all of the assets transferred to the corporation.[4]

II

Under Section 112 (b)(5) of the 1939 Code, No Gain or Loss Is Recognized as to the Transfer of Partnership Assets to the Corporation

Section 112(b)(5) of the 1939 Code provides in pertinent part that:

> No gain or loss shall be recognized if property is transferred to a corporation by one or more per-

[4] Petitioner's contention (Br. 42-43), that this amounts to a holding that taxpayer was guilty of fraud with intent to evade tax, scarcely merits comment. Fraud in this context connotes something more than a desire and purpose to minimize or avoid taxes; and is not present where a tax avoidance device is fairly and honestly presented to the taxing authorities and the courts for evaluation.

> sons solely in exchange for stock * * * in such corporation, and immediately after the exchange such person or persons are in control of the corporation; * * *

In the case at bar, as we have seen, all of the assets transferred by the Miller brothers to the corporation are reflected in the stock since they all comprised part of the initial capital investment. It follows that in substance the assets were transferred solely in exchange for stock; and since there is no dispute that the Miller brothers were in control of the corporation immediately after the exchange, Section 112(b)(5) is clearly applicable to the transaction.

Section 112(b)(5) withholds recognition of gain or loss upon exchanges to which it applies; and Section 113(a)(8), *supra,* provides that upon such exchanges the corporation acquires the basis of the transferors. Therefore, the Commissioner correctly eliminated from taxpayer's income the long-term capital gain reported on the transfer of his proportionate share of partnership assets to the corporation.[5]

III

Payments of Principal on the Purported Notes Are, to the Extent of Available Earnings and Profits, Taxable Dividends Under Section 115 (a) of the 1939 Code

Section 115(a) of the 1939 Code provides that *any* distribution made by a corporation to its shareholders

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[5] The taxpayer argues (Br. 47-48) that Section 112 (b)(5) can not apply because the "loans", even if they were not true debt, represented paid-in surplus and that no stock was issued. This is a fallacious contention for, no matter what the capital account shows on the books, the stock was necessarily issued as the only consideration for all the property received by the corporation.

out of earnings and profits constitutes a dividend; and Section 115(b) provides that every corporate distribution *is* made out of earnings or profits to the extent thereof.

Petitioner argues that, even though the notes be held to represent capital investments, payments on the principal thereof can not be dividends, but must be regarded as distributions in partial liquidation. (Br. 51.) This argument is patently unsound. The assets of the corporation are reflected in the stock, not in the notes; and hence purported payments on the notes—whether designated as principal or interest—are simply distributions referable to the stock, received by the stockholders as such.

Here, the distributions in question were not made in redemption of any of the stock.[6] They were simply distributions of earnings and profits, as petitioner concedes (Br. 41-42), to the proprietors of the corporation—the owners and operators of the business. Each of the stockholders continued to have the same stock interest notwithstanding these payments. As such the payments were clearly taxable dividends under Section 115(a) and (b). *Houck* v. *Hinds,* 215 F. 2d 673 (C.A. 10th).

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[6] Even if there had been a redemption of stock, the circumstances would compel the conclusion that it was essentially equivalent to the distribution of a dividend and taxable as a dividend under Code Section 115 (g)(1).

CONCLUSION

For all of the foregoing reasons, we submit that the decisions of the Tax Court were correct and should be affirmed.

Respectfully submitted,

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